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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS AT AUSTIN

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ANTHONY RUFFINS, Appellant
v.
THE STATE OF TEXAS, Appellee

03-18-00540-CR
In the Third Court of Appeals
Austin, Texas

Appealed from the 207th Judicial District Court
Cause No. CR2016-614
Comal County, Texas

STATE'S PETITION FOR DISCRETIONARY REVIEW

Jennifer Tharp
Criminal District Attorney

By
Jacqueline Hagan Doyer
SBN: 24086703
199 Main Plaza, Suite #2007
New Braunfels, Texas 78130
(830) 221-1300
Fax (830) 608-2008
doyerj@co.comal.tx.us
Attorney for the State

Identity of Judge, Parties and Counsel

Judge

The Honorable Dwight Peschel, Presiding Judge

Attorneys for the Appellant, Anthony Ruffins

AT TRIAL
Anthony Cantrell
111 Soledad St., Ste. 1200
San Antonio, TX 78205

ON APPEAL
Karen Oprea
1411 West Ave, Ste. 200
Austin, TX 78701
Telephone: (512) 344-9070
Facsimile: (512) 366-9467

Attorneys for the Appellee, The State of Texas

AT TRIAL
Allison Buess & Kiera Kilday
Assistant District Attorneys
Criminal District Attorney's Office
199 Main Plaza, Suite 2007
New Braunfels, Texas 78130

ON APPEAL
Jacqueline Hagan Doyer & Joshua D. Presley
Assistant District Attorneys
Criminal District Attorney's Office
199 Main Plaza, Suite 2007
New Braunfels, Texas 78130
Telephone: (830) 221-1300
Facsimile: (830) 608-2008
Email: doyerj@co.comal.tx.us

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Statement Regarding Oral Argument

Oral argument will assist this Court's review of the issues presented. *Ruffins* will be a published case which misapplies the *Almanza* harm analysis, ignores the doctrine of estoppel, and inaccurately distinguishes binding precedent. Further, *Ruffins* imposes an additional evidentiary burden on the State that does not appear in the statute applicable to the case; to do so, *Ruffins* relies on authorities which did not actually address the evidentiary burden or whether it should apply to the State. The State believes oral argument would allow the parties to more fully present their arguments through interactive questioning and discussion. *See* Tex. R. App. P. 66.3(a)-(e).

Statement of the Case

Appellant was charged with one count of Aggravated Robbery, enhanced as a habitual offender (I C.R. at 5-10). Appellant pled not guilty and a jury trial commenced on August 7, 2018 (*see* II-III R.R.). The jury convicted Appellant (I C.R. at 140). The Trial Court sentenced Appellant to life imprisonment (*id*. at 141; VI R.R).

At trial, a witness named David Hogarth testified regarding his presence during conversations where Appellant and his co-defendants planned to rob a tattoo shop in New Braunfels, Texas (*see* III R.R. at 40-41, 44-45). Hogarth further testified that he observed Appellant and his co-defendants leave to commit the robbery in a

white Volvo and identified Appellant and the other individuals that were involved in the robbery (*id*. at 46-52). Hogarth also testified Appellant threatened to harm Hogarth if he cooperated with law enforcement (*id*. at 54-55). Trevino, the mastermind of the robbery, testified at trial regarding the plan and Appellant's role in the robbery (*id*. at 201-10).

Appellant requested the jury charge include instructions that both Hogarth and Trevino were accomplices as a matter of law (*see* V R.R. at 15). The Trial Court denied Appellant's request for an accomplice as a matter of law instruction regarding Hogarth, but submitted the issue as a matter of fact for the jury to determine (*id*.; *see* I C.R. at 136-37). The Trial Court submitted the accomplice as a matter of law instruction regarding Trevino (I C.R. at 135-36).

Appellant specifically requested that the accomplice-in-fact instruction include language that the jury had to agree 'beyond a reasonable doubt' that Hogarth was an accomplice (V R.R. at 22). The State read the charge out loud on the record and Appellant stated "I'm good" (*id*.). The charge was submitted to the jury with Appellant's requested language that required corroboration for Hogarth's testimony if they believed Hogarth was an accomplice beyond a reasonable doubt (I C.R. at 136-37). The charge also instructed the jury that the testimony of Trevino—an accomplice as a matter of law—had to be corroborated (*id*. at 135-36). The record

contained substantial non-accomplice corroborative evidence tending to connect Appellant to the offense. *See infra*.

The Third Court of Appeals reversed Appellant's conviction, asserting the charge erroneously inverted the burden of proof on the accomplice-in-fact instruction and speculating that said instruction harmed Appellant. *Ruffins v. State*, No. 03-18-00540-CR, 2020 Tex. App. LEXIS 6499 (Tex. App.—Austin 2020) (designated for publication).

Statement of Procedural History

On appeal, the parties submitted briefs addressing eleven points of error. The parties' request for oral argument was denied and the case was set for submission on briefs. The Court of Appeals found there was error in the jury charge, that Appellant suffered egregious harm from said error, and remanded the case to the Trial Court for further proceedings. Justice Goodwin dissented. The State did not file a motion for rehearing or reconsideration. The State's Petition for Discretionary Review was originally due on September 13, 2020; however, this Court granted the State's motion for extension of time to file the petition, and the State's now timely and respectfully files its Petition for Discretionary Review.

Questions Presented for Review

1. If the testimony from an alleged accomplice witness-in-fact is completely removed from consideration, where the jury charge contained *two* accomplice witness instructions—one clearly correct regarding the accomplice as a matter of law—and there was substantial non-accomplice evidence to corroborate either accomplice witness's testimony, did Appellant suffer egregious harm from any alleged error in the accomplice-in-fact instruction?

2. Did Appellant invite—or is he otherwise estopped from challenging—the allegedly erroneous instruction he requested and now complains of on appeal?

3. Was Appellant even entitled to an instruction on whether Hogarth was an accomplice as a matter of fact?

4. In a case where the Defense argues a witness was an accomplice, who bears the burden to prove a witness's status as an accomplice as a matter of fact, and what is the appropriate burden?

Standard of Review

A claim of error in the jury charge is reviewed using a two-step process. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). First, the reviewing court must determine whether error actually exists in the charge. *Id*. If error does exist, "the court must determine whether sufficient harm resulted from the error to require reversal." *Abdnor*, 871 S.W.2d at 731-32. "The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). "When the defendant fails to object or states that he has no objection to the charge," only "egregious harm" to the defendant will require reversal. *Id*. at 744.

The egregious harm standard requires reversal only if the charge error was so egregious that the defendant was deprived of a fair and impartial trial. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). Courts review the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information revealed by the record as a whole to determine whether a defendant was deprived of a fair and impartial trial. *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). There must be "actual, not just theoretical, harm to the accused" to warrant reversal. *Id*. "Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis." *Kuhn v. State*, 393 S.W.3d 519, 525 (Tex. App.—Austin 2013, pet. ref'd).

Argument

1. The *Ruffins* Majority Erred in Its Application of the Harm Analysis in This Case, and Appellant Did Not Suffer Egregious Harm From Any Alleged Error in the Accomplice-in-Fact Instruction.

The *Ruffins* majority incorrectly assessed the effect of the entire jury charge, the arguments of counsel, and the strength of the State's evidence and arrived at the inaccurate conclusion that Appellant suffered egregious harm. *Ruffins v. State*, No. 03-18-00540-CR, 2020 Tex. App. LEXIS 6499, at *19 (Tex. App.—Austin 2020) (designated for publication) (emphasis added).

"Under the egregious harm standard, the *omission* of an accomplice witness instruction is generally harmless unless the corroborating (non-accomplice) evidence is so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2002) (emphasis added). In the situation where an accomplice as a matter-of-*fact* instruction was improperly submitted in lieu of an accomplice as a matter-of-*law* instruction, the analysis appears to proceed *by removing that witness's testimony from consideration* and determining whether the remaining evidence was "not so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Patt v. State*, No. 10-10-00023-CR, No. 10-10-00024-CR, 2010 Tex. App. LEXIS 7288, at *8 (Tex.

App.—Waco 2010, pet. ref'd) (not designated for publication) (citing *Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002)).

Removing Hogarth's testimony from consideration, the State's remaining evidence included:

1) the testimony of Trevino, an accomplice as a matter of law,

2) a correct accomplice-witness instruction regarding Trevino's testimony, and

3) substantial non-accomplice evidence that tended to connect Appellant to the offense.

In the instant case, a review of the entirety of the jury charge reveals *two* accomplice witness instructions were submitted to the jury. One instruction specifically instructed the jury that Trevino was an accomplice as a matter of law and his testimony must be corroborated. The second—complained of—instruction asked the jury to determine whether Hogarth was an accomplice as a matter of fact. Both instructions included the corroboration requirement. The instant case is distinguishable from the authorities cited by the *Ruffins* majority on those facts alone; this is not a case where an instruction was completely omitted. As the jury was properly instructed regarding the requirement for corroboration on—at least—Trevino's testimony, this weighs against a finding of harm.

In reviewing the arguments of counsel, both parties acknowledged Trevino was an accomplice as a matter of law and his testimony must be corroborated.[1] Appellant did not really contest Trevino's testimony regarding Appellant's involvement in the crime.[2] Instead, Appellant implored the jury not to believe Hogarth or Trevino and asserted the corroborating evidence was insufficient.[3] The State, however, highlighted corroborating evidence for the jury.[4] The arguments of counsel clearly articulated the corroboration requirement applied to accomplice witness testimony. Accordingly, this factor should weigh against a finding of harm.

With regard to the strength of the State's evidence, the *Ruffins* majority noted that "although *some* corroborating evidence was presented, the evidence of [Appellant's] guilt other than the testimony from ***Trevino and*** *Hogarth* was less than overwhelming." *Ruffins*, 2020 Tex. App. LEXIS 6499 at *24 (emphasis added). The proper analysis, however, should have removed *only Hogarth's* testimony from consideration and assessed the strength of the State's remaining evidence.

Aside from Trevino's testimony, the non-accomplice evidence in the record included: surveillance footage that placed Trevino's white Volvo in the vicinity of the tattoo shop around the time of the robbery[5], surveillance video that depicted the

[1] (V R.R. at 43).
[2] (*see id*. at 63-65).
[3] (*id*. at 61-62, 72-74).
[4] (*id*. at 43, 87, 93).
[5] (State's Exs. 90-98). Hogarth testified he saw Appellant and his co-defendants leave in a white Volvo (III R.R. at 46).

individuals committing the robbery[6], Detective Mahoney's testimony that he believed Appellant walked with a similar gait and had a similar appearance as the individual who had been identified as Appellant on the surveillance video[7], social media posts by Appellant that showed Appellant wearing a fairly distinctive hat similar to the individual identified as Appellant on the surveillance video[8], social media evidence that Appellant and the other perpetrators of the robbery were closely associated with one another,[9] evidence that Appellant, Robert Ruffins, and Olanda Taylor were related to one another[10], evidence that Appellant called co-defendant McMichael his "shooter" in a social media post near the time of the robbery[11], a safe consistent with the safe stolen from Timeless Ink was located in a dumpster at the apartment complex where Appellant was living the day after the robbery[12], the day after the robbery the victims' cell phones were recovered from individuals living at the same apartment complex where Appellant was living[13], Appellant was the "last one to be found" and was apprehended in Houston though he previously resided in San Antonio[14], testimony from Detective Mahoney about Appellant's statements

[6] (State's Ex. 42).
[7] (IV R.R. at 156-57, 170).
[8] (State's Exs. 71, 78).
[9] (State's Exs. 75-89).
[10] (IV R.R. at 132).
[11] (State's Ex. 84).
[12] (III R.R. at 181, State's Exs. 68-70).
[13] (III R.R. at 177-80).
[14] (IV R.R. at 57).

during Appellant's interview which included "if you say I did it, I did it. If you say it's me [in the robbery surveillance video], it's me[15]," and testimony from Detective Mahoney that Appellant showed no reaction when he was presented with video footage of the particularly brutal robbery[16].

Moreover, article 38.14 applies only to *in-court testimony* from an accomplice witness. *Bingham v. State*, 913 S.W.2d 208, 210 (Tex. Crim. App. 1995). On cross-examination by Appellant, Detective Mahoney—who was not an accomplice witness—testified that Hogarth initially told him the individual in the surveillance footage was *not* Appellant, but subsequently admitted it *was* Appellant (IV R.R. at 111-12). Detective Mahoney further testified that Hogarth told Mahoney Appellant threatened Hogarth if he cooperated with law enforcement and that Hogarth provided the names of the individuals—including Appellant—involved in the robbery (*id*. at 163, 172). Detective Mahoney's testimony regarding the identification information from Hogarth and Appellant's threat to Hogarth *was not in-court testimony by Hogarth* and was not subject to the corroboration requirements of article 38.14. *See Bingham*, 913 S.W.2d at 210. Accordingly, the jury was entitled to rely on that evidence in corroborating any accomplice witness testimony.

[15] (IV R.R. at 59-60).
[16] (*id*. at 58-59).

The *Ruffins* majority reached its conclusion that Appellant suffered egregious harm by "placing itself too far in the role of the factfinder." *Ruffins*, 2020 Tex. App. LEXIS, at *51 (Goodwin, J., dissenting). While a harm analysis "involves evaluating the strength and weaknesses of the evidence…at some point an appellate court crosses the line when it substitutes ***its own credibility assessments and fact determinations for those of the jury***." *Id*. at *53 (emphasis added). It is well settled that an appellate court cannot substitute its judgment for that of the jury, should not "usurp the role of the factfinder," and is "ill-equipped to weigh the evidence." *Cf. Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011) ("[I]t is not appropriate for appellate courts to independently construe the non-accomplice evidence.").

Throughout its analysis, the *Ruffins* majority explains away the significance of each piece of evidence in piecemeal fashion. *Id*. at *24-27. But non-accomplice evidence "cannot be considered in a vacuum. It must be considered in conjunction with the other corroborating evidence[.]" *Simmons v. State*, 282 S.W.3d 504, 509 n.6 (Tex. Crim. App. 2009).[17] Though corroborating evidence "must simply link the accused in some way to the commission of the crime,"[18] the *Ruffins* majority

[17] *See also cf. Smith*, 332 S.W.3d at 447 ("Though each of the facts discussed above, considered individually, would not satisfy Article 38.14, the cumulative force of the non-accomplice evidence, giving proper deference to the jury's resolution of the facts, tends to connect [the appellant] to the murders.").
[18] *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008).

"substitute[d] its own fact findings to lower the standard for egregious harm and raise the standard for corroboration." *Ruffins*, 2020 Tex. App. LEXIS, at *53 (Goodwin, J., dissenting).

Further, the *Ruffins* majority improperly "afford[ed] credibility to [Appellant's] alibi witness and [Appellant's] self-serving denials," though the jury obviously rejected both. *See id*. at *52 (Goodwin, J., dissenting). The fact that there may be "evidence in the record that also tends to refute" the corroborative evidence "does not translate into a conclusion that there was no evidence that a rational trier of fact could conclude [the evidence] tended to connect [an] appellant to the offense for purposes of Article 38.14's corroboration requirement." *Casanova v. State*, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012).

The *Ruffins* majority failed to properly analyze egregious harm, particularly in light of the fact that Trevino's testimony directly implicated Appellant, Trevino's testimony was corroborated by substantial non-accomplice evidence, the parties reiterated the corroboration requirement, and the jury received a proper instruction requiring corroboration of Trevino's testimony, irrespective of any alleged error in the instruction regarding Hogarth's testimony.

Moreover, egregious harm requires *actual*—not theoretical—harm. The *Ruffins* majority speculates that Appellant was harmed, but "speculation only leads to theoretical harm, rather than actual harm." *Gardner v.* State, No. 13-07-446-CR,

2008 Tex. App. LEXIS 7326, at *42 (Tex. App.—Corpus Christi 2008, no pet.) (not designated for publication) (citing to *Almanza*, 686 S.W. 2d at 174).[19] Because the *Ruffins* majority incorrectly employed the *Almanza* harm analysis, the opinion must be reversed.

2. Where Appellant *Specifically Requested* an Instruction That the Jury Determine Whether Hogarth Was an Accomplice Beyond a Reasonable Doubt, Was Pointed to the Now Complained-of Instruction in the Charge, and Said "I'm Good," Appellant Invited the Error and Is Precluded by General Principles of Estoppel From Complaining About the Instruction on Appeal.

"If a party affirmatively seeks action by the trial court, that party cannot later contend that the action was error." *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). "[T]he law of invited error estops a party from making an appellate error of an action it induced." *Id*. Additionally, "[e]stoppel is a flexible doctrine that takes many forms" and invited error is merely one form of estoppel. *Deen v. State*, 509 S.W.3d 345, 348 (Tex. Crim. App. 2017); *Prystash*, 3 S.W.3d at 531. Under the more general principle of estoppel, "a party may be estopped from asserting a claim that is inconsistent with that party's prior conduct." *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003).

[19] *Ruffins*, 2020 Tex. App. LEXIS 6499, at *54 ("The majority's conclusion that 'the jury *could* have had a reasonable doubt regarding whether Hogarth was an accomplice' because of the alleged error in the accomplice-witness instruction is, in my view, merely theoretical harm.").

At the end of the charge conference, Appellant specifically requested an instruction that the jury "ha[s] to agree beyond a reasonable doubt that [Hogarth] is an accomplice" (V R.R. 22). The State read the (now complained-of) instruction that was included in the charge (*id*.). After hearing his requested instruction was in the charge, Appellant stated "I'm good" (*id*.).

The *Ruffins* majority characterized Appellant's *request* for the beyond a reasonable doubt instruction *and subsequent statement* "I'm good" as merely a "withdr[awal] [of] his objection to that part of the charge." *Ruffins*, 2020 Tex. App. LEXIS 6499, at *14. Appellant's request and affirmance that he was "good" with the instruction when read in context, however, demonstrates "not only an acceptance of the instruction but an affirmation that the allegedly erroneous instruction sufficed to address his requested instruction." *Id*., at *45-46 (Goodwin, J., dissenting). Indeed, the "trial court stopped addressing that particular instruction—and left it in the form [Appellant] now complains about—[] because [Appellant] indicated to the court that he was 'good.'" *Id*. at *47. Appellant invited—or at least joined in inviting—this alleged error. *Id*. at *46-47.

In any event, Appellant is barred from asserting this error by the more flexible doctrine of estoppel because "knowing full well the exact content of the reasonable-doubt instruction in the court's jury charge (because it had just been read verbatim

in open court), [Appellant] accepted the allegedly erroneous instruction." *Id*. at *48-49.

Because Appellant invited this error, requested the instruction, or at least accepted the instruction as substantially identical to his requested instruction, he is barred by invited error or the more flexible doctrine of estoppel from now complaining about the instruction he requested on appeal.

3. Appellant Was Not Entitled to an Accomplice-in-Fact Instruction Regarding Hogarth's Testimony in the First Place.

"If there is a conflict in the evidence, *then* the [accomplice-in-fact] question is submitted to the jury." *Silba v. State*, 275 S.W.2d 108, 109 (Tex. Crim. App. 1954) (emphasis added). *But if there is not enough evidence* to support a charge against the witness as either a principal, an accomplice, or an accessory, then he is *not* an accomplice witness…" *Id*. (emphasis added).

The *Ruffins* majority believed there was "conflicting" evidence whether Hogarth was an accomplice. *Ruffins*, 2020 Tex. App. LEXIS, at *19. An objective review of the entire record, however, demonstrates the evidence is wholly insufficient to suggest Hogarth should be 'answerable' to the law for a role in the Aggravated Robbery.

Generally speaking, the evidence the majority identifies in support of their conclusion is evidence Hogarth was *present* for the planning of the robbery,

according to Trevino Hogarth 'seemed disappointed' after-the-fact that he was left behind, and Hogarth was initially uncooperative with law enforcement in the investigation. The majority opinion also isolates two statements from Hogarth in response to leading questions on cross-examination as support for the notion that Hogarth 'admitted' he was involved in the planning of the robbery, but ignores the context of his statements and the rest of Hogarth's answers in that very same line of questioning.[20] *But see cf. Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986) (in determining the applicability of a defensive instruction, one statement "cannot be plucked out of the record and examined in a vacuum"); *Romero v. State*, No. 08-05-00005-CR, 2006 Tex. App. LEXIS 7552, at *15-17 (Tex. App.—El Paso 2006, no pet.) (not designated for publication) (citing *Godsey* for this proposition and determining the appellant was not entitled to an accomplice-in-fact instruction).

The *Ruffins* majority failed to address binding precedent presented by the State,[21] and in one instance 'distinguished' precedent because "the evidence [in

[20] *Ruffins* also relied on evidence that this Court and other appellate courts have determined does *not* constitute evidence of an 'affirmative act to assist in the commission of the offense.' *See, e.g., Villarreal v. State*, 576 S.W.2d 51, 56 (Tex. Crim. App. 1978) ("A witness is not deemed an accomplice witness because he knew of the crime but failed to disclose it or even concealed it."); *Delacerda v. State*, 425 S.W.3d 367, 395-96 (Tex. App.—Houston [1st Dist.], pet. ref'd) (lying or directing someone else to lie to law enforcement "were not affirmative acts assisting in the commission of the [offense]"); *Juarez v. State*, 2005 Tex. App. LEXIS 8436, at *7-8 (Tex. App.—Austin 2005, no pet.) (not designated for publication) (where witness *believed he was a co-defendant* but investigation ultimately ruled him out, no error in omitting accomplice as a matter-of-fact instruction); *Creel v. State*, 754 S.W.2d 205, 213 (Tex. Crim. App. 1988) ("…a witness'[s] complicity with the accused in the commission of another offense does not make [his] testimony that of an accomplice for which the accused is on trial."); *see also* Brief for the State at 9-19.

[21] *See* Brief for the State at 12 n.5.

Druery] showed ***among other things***…the witnesses 'mere presence, knowledge of planned offense, and failure to disclose it did not render them accomplice witnesses…" *Id*. at *23 n.2 (emphasis added). Importantly, the 'among other things' *Ruffins* glossed over from *Druery* included evidence that one of the alleged accomplice witnesses *assisted in disposing of the victim's body and in disposing of the murder weapon*. *Druery v. State*, 225 S.W.3d 491, 500 (Tex. Crim. App. 2007). Even those facts did not entitle Druery to an accomplice-in-fact instruction on said witness. *Id*. The *Ruffins* majority fails to acknowledge, let alone explain, how the presence of far more damning facts in *Druery* (and other cases) did not warrant an accomplice-in-fact instruction, while the more meager facts in the instant case entitled Appellant to an instruction.

Because Appellant was not entitled to an accomplice-in-fact instruction in the first place, *Ruffins* must be overruled.

4. In a Case Involving Alleged Accomplice Witnesses, the *Defendant* Bears the Burden to Prove a Witness's Status as an Accomplice and Any Alleged Error in the Instruction Submitted Was Invited By Appellant and/or Did Not Egregiously Harm Appellant.

The *Ruffins* majority and Appellant believe the jury charge in the instant case was erroneous based on the premise that 1) there should have been an accomplice-in-fact instruction on this record, and 2) the standard of proof on the accomplice as a matter of fact issue had been "inverted." Neither the majority nor Appellant cited

any authority directly addressing what the burden is or should be, or who bears the burden to prove—or disprove—whether a witness is an accomplice witness.

There is no authority from this Court or the Third Court that places the burden on the State to *disprove* a witness's status as an accomplice as a matter of fact beyond a reasonable doubt. Indeed, Article 38.14 makes no mention of any burden on any party but simply imposes the corroboration requirement, *if* a witness is an accomplice. Tex. Code Crim. Proc. art. 38.14. Moreover, precedent from the Court of Criminal Appeals places the burden to develop or raise the accomplice issue *on the defendant*. In fact, several jurisdictions recognize the burden is on a defendant to prove the witness was an accomplice. Because *Ruffins* held otherwise, it must be overruled.

A. The authorities cited by the *Ruffins* majority in support of its reasoning are inapposite or distinguishable.

In support of its rationale, *Ruffins* observed "[s]imilar 'reasonable doubt' language has been included in numerous jury charges reviewed by various appellate courts." *Ruffins*, 2020 Tex. App. LEXIS 6499, at *16. The authorities cited by *Ruffins* do not actually address this "language" as a contested 'issue' in those cases.[22]

[22] In each of these opinions, the intermediate courts of appeals quoted the language from the jury instructions that were submitted in each case. None of those opinions addressed, let alone analyzed, a complaint about the burden of proof in the instruction. As such, these cases are inapposite. *Cyr v. State*, 308 S.W.3d 19, 24 (Tex. App.—San Antonio 2009, no pet.); *Elliot v. State*, 976 S.W.2d 355, 358 (Tex. App.—Austin 1998, pet. ref'd); *Estrada v. State*, No. 08-15-00271-CR, 2018 Tex.

Such recitations might be considered 'dictum'—though likely not even that, as the respective courts did not even express an opinion[23] on the propriety of such language, but merely recounted what factually took place. At best, these cases are merely examples of what has been done on occasion—at the trial court level—in the past. Blind adherence to tradition without inquiry into its rationale or propriety frustrates the interests of justice. Indeed, "[t]he most damaging phrase in the [English] language is 'We've always done it this way.'"[24]

While each of these cases included an instruction that asked the jury to determine whether the witness was an accomplice, or the jury had a reasonable doubt thereof, *none of these cases analyzed whether such instruction was correct*, let alone required. *Ruffins* also references the comment on Texas Criminal Pattern Jury Charges § CPJC 3.4 for the proposition that "if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration *is required unless*, 'the [S]tate proves beyond a reasonable doubt that a witness is not an accomplice witness." *Ruffins*, 2020 Tex. App. LEXIS 6499, at *17.

The *Ruffins* majority mischaracterizes the Pattern Jury Charge's comment. The comment actually states that it is "[e]xisting practice" to instruct jurors the

App. LEXIS 4885, at *4 (Tex. App.—El Paso 2018, pet. ref'd) (not designated for publication); *Losoya v. State*, No. 05-10-00396-Cr, 2012 Tex. App. LEXIS 5103, at *11-13 (Tex. App.—Dallas 2012, pet. ref'd) (not designated for publication).

[23] *See Oliva v. State*, 548 S.W.3d 518, 524, 524 n.34, n.35 (Tex. Crim. App. 2018); *see also Kastigar v. United States*, 406 U.S. 441, 454-55 (1972).

[24] Rear Admiral Grace Hopper.

corroboration is required "unless the state proves beyond a reasonable doubt that a witness is not an accomplice witness." Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018).[25] 'Existing practice' and what is *correct* or *required* are two entirely different concepts. *See Ruffins*, 2020 Tex. App. LEXIS 6499, at *50-51 (Goodwin, J., dissenting) ("…while such an instruction may have been given and upheld in some cases…that does not mean that the law requires that such an instruction be given."). Indeed, the comment on the accomplice witness instruction in the Texas Criminal Pattern Jury Charge observes that "[t]here seems neither need nor justification for imposing a requirement of proof beyond a reasonable doubt." Comm'n on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions* CPJC 3.4 (2018).

The authorities cited by the *Ruffins* majority could just as easily support the proposition that trial courts have been submitting erroneous instructions improperly increasing the State's burden, on which the State 1) did not object, or 2) the State's objection was overruled at trial, and the State had relatively little motivation to

[25] The cases cited in the comment are *Pace v. State*, 124 S.W. 949, 952-53 (Tex. Crim. App. 1910) and *Haney*, 951 S.W.2d at 553. The State relies on its arguments *infra* regarding the inapplicability of *Haney*. In *Pace*, again—the opinion merely quoted an instruction that contained the "beyond a reasonable doubt" language, but did not analyze or determine whether the burden on accomplice status was on the State or the defendant, nor did it address what the proper burden should be. *Pace*, 124 S.W. at 952-53.

attempt to argue the matter on appeal, since the defendant had been convicted anyway.

The *Ruffins* majority also cited *Haney v. State*, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997, no pet.), claiming that *Haney* had "explained that *a proper* accomplice instruction *should* inform the jury that if 'they have a reasonable doubt regarding whether or not the witness acted as [an] accomplice, then corroboration is necessary.'" *Ruffins*, 2020 Tex. App. LEXIS 6499 at *16 (emphasis added). *Haney* did not say that.

Haney involved an appellant's *complaint* that the "phrasing of the accomplice witness instruction…improperly place[d] the burden of proof on the defendant to show whether or not the witness was an accomplice." *Haney*, 951 S.W.2d at 553. *Haney* rejected the appellant's factual claim, noting the instruction—as drafted—actually placed the burden on the State, but expressed no opinion on whether that was actually *proper*. *Id*.

Based on the instruction given, if the State failed to prove that the witness was not an accomplice, then corroboration was required. *Id*. *Haney* cited to *Boozer* for the proposition that "when the State fails to object to the court's giving an accomplice witness instruction it bears the burden of proof on this issue." *Id*. The "burden of proof" that the State bore, however, was the burden to produce corroborating evidence in order to meet its burden of proof beyond a reasonable

doubt, not a burden on the witness's status as an accomplice. *See Boozer v. State*, 717 S.W.2d 608, 609 (Tex. Crim. App. 1984), overruled by *Malik v. State*, 953 S.W.234, 235 (Tex. Crim. App. 1997)).

It appears much has been extrapolated from *Haney* that *Haney* did *not* decide. The most that can be gleaned from *Haney* is that the appellant's factual premise was incorrect. *Haney* does not stand for the further proposition that *if* the charge had placed the burden on defendant, such would automatically have been improper. *Haney* never had to reach the latter issue, because the defendant's former factual premise was incorrect. Accordingly, *Haney* does not mean the instruction in that case—which improperly placed the burden on the State, but which the State did not complain of after Haney's conviction—was appropriate or *required* under the law.

B. Precedent and simple logic indicate the burden to show a witness is an accomplice as a matter of law or fact is on the defendant in a criminal case.

As noted *supra*, the fact that various trial courts have submitted the 'beyond-a-reasonable-doubt' language in prior cases does not mean such an instruction is required or proper. This begs the question: what is the burden, and on whom does it lie?

Generally, "[i]t is incumbent upon the accused to develop such facts as would show that the [accomplice witness] rule applies." *Lundy v. State*, 296 S.W.2d 775,

776 (Tex. Crim. App. 1956). "[A]s in any other criminal prosecution, the defendant must point to sufficient evidence in the record establishing that [a witness] was an accomplice in order to invoke the accomplice witness rule." *Phelps v. State*, 532 S.W.3d 437, 447 (Tex. App.—Texarkana 2017, pet. ref'd). It appears that it has long been the rule that burden is upon *the accused* to demonstrate that a witness is an accomplice. [26] Indeed, several jurisdictions explicitly recognize the burden is on the defendant.[27]

The rationale for placing the burden on the defendant is "obvious;" it is the defendant who "receives the benefit of the statutory requirement that the state present [corroborating evidence]." *Oatney*, 66 P.3d at 480. The burden to show that a witness was an accomplice rests on the defendant because the accomplice witness instruction is "in the nature of a defense." *People v. Rossi*, 183 N.E.2d 895, 897

[26] *See also* 23A C.J.S., Criminal Procedure and Rights of Accused § 1414 (2020) ("The defendant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated…[t]he party that raises the accomplice issue has the burden of proving the accomplice status…it must be established by a preponderance of the evidence…"); Wigmore on Evidence, § 2060(e) (4th Ed. 2007).

[27] *See, e.g., McIntosh v. State*, 552 S.W.2d 649, 651 (Ark. 1977) ("'The burden of proving that a witness is an accomplice whose testimony must be corroborated is on the party asserting it.'") (quoting 23 C.J.S., Criminal Law § 796a (1961)); *Hicks v. State*, 149 S.W. 1055, 1056 (Tenn. 1912) ("…whether he be an accomplice or not is a question of fact…the burden being upon the party invoking the rule to prove by a preponderance of the evidence…"); *State v. Oatney*, 66 P.3d 475, 480 (Or. 2003) ("…the *defendant* must prove that the witness is an accomplice in order to require corroboration."); *People v. Tewkberry*, 544 P.2d 1335, 1346-47 (Cal. 1976) (same); *Bennett v. State*, 392 A.2d 76, 81 (Md. 1978) ("placing the burden on a defendant to prove that a witness is an accomplice has no constitutional proscriptions"); *State v. Houston*, 206 N.W.2d 687, 689 (Iowa 1973) (instruction placing burden on the State to prove beyond a reasonable doubt witnesses were not accomplices "improper").

(N.Y. 1962). "If the jury find[s] the witness to be an accomplice, they will apply the rule requiring corroboration; but if the jury fail to so find, his evidence will be given the same weight as that of other witnesses." *Hicks*, 149 S.W. at 1056.[28]

The "degree of proof by which an accused must establish that a witness is an accomplice is the same as in other instances wherein he has the burden of establishing a collateral fact which conditions a challenge to the reliability of incriminating evidence…by proof by a preponderance of the evidence." *Tewkberry*, 544 P.2d at 1346. When a defendant succeeds in doing so, "there are *two* means by which the [State] may nevertheless vest the witness' testimony with reliability…overcome the accused's proof that the witness is an accomplice, or produce corroboration." *Id*. at 1347 (emphasis in original). Corroborative evidence, however, need only "connect the accused with the commission of the crime…[and] may be slight and entitled to little consideration when standing alone." *Id*.; *see also Smith*, 332 S.W.3d 447.

The *Ruffins* majority has announced a new rule that imposes a burden on the State that 1) has no statutory authority, 2) is unsupported by the authorities the *Ruffins* majority cites, and 3) appears to be logically inconsistent with the purpose

[28] This distinguishes the accomplice witness rule from evidentiary rules that place a burden on the State before the evidence can be considered. *See e.g.*, Tex. Code Crim. Proc. arts. 38.22-38.23. In a case involving an accomplice witness—even if the witness is believed to be an accomplice—the witness's testimony may still be considered, the question is merely whether or not it requires corroboration.

and nature of the rule. Article 38.14 is intended to protect an accused from conviction based on the testimony of an accomplice *alone*. Article 38.14 remedied that concern by requiring corroboration of accomplice witness testimony.

If the instruction should have set out that it was Appellant's burden to show Hogarth was an accomplice by a preponderance of the evidence, then the jury charge contained an error. Even so, Appellant is not entitled to reversal for the reasons noted *supra*, *i.e.*, 1) Appellant requested the jury to be instructed 'beyond a reasonable doubt' regarding Hogarth's testimony and subsequently stated "I'm good" when the charge was read to him in open court, 2) Appellant was never entitled to an instruction on Hogarth in the first place, and 3) Hogarth's testimony was corroborated and—even removing Hogarth's testimony from consideration—the proper harm analysis demonstrates Appellant did not suffer egregious harm.

PRAYER

Wherefore, premises considered, the State respectfully prays that this Honorable Court reverse the Third Court's decision. The State also prays for all other relief to which it may be entitled.

Respectfully submitted,

/s/ Jacqueline Hagan Doyer
Jacqueline Hagan Doyer
SBN: 24086703
Assistant District Attorney
199 Main Plaza, Ste. #2007
New Braunfels, Texas 78130
Phone: (830) 221-1300
Fax: (830) 608-2008
doyerj@co.comal.tx.us
Attorney for the State

Certificate of Compliance

I hereby certify, pursuant to Rule 9.4 of the Texas Rules of Appellate Procedure that the instant petition is computer-generated using Microsoft Word and said computer program has identified that there are 5,254 words within the portions of this petition required to be counted by the Texas Rules of Appellate Procedure. A motion to exceed is being filed alongside the instant Petition.

The document was prepared in proportionally-spaced typeface using Times New Roman 14 for text and Times New Roman 12 for footnotes.

/s/ Jacqueline Hagan Doyer
Jacqueline Hagan Doyer

Certificate of Service

I, Jacqueline Hagan Doyer, attorney for the State of Texas, Appellee, hereby certify that a true and correct copy of this *State's Petition for Discretionary Review* and the attached appendix has been delivered to Appellant ANTHONY RUFFINS's attorney of record in this matter, along with the State Prosecuting Attorney's office:

Karen Oprea
1411 West Ave., Ste. #200
Austin, TX 78701
Karen.oprea@opreaweberlaw.com
Counsel for Appellant on Appeal

Emily Johnson-Liu
209 W. 14th Street
Austin, TX 78701
Emily.Johnson-Liu@SPA.texas.gov
Office of the State Prosecuting Attorney

By electronically sending it through efile.txcourts.gov to the foregoing email addresses on this, the 14th day of October, 2020.

/s/ Jacqueline Hagan Doyer
Jacqueline Hagan Doyer

Appendix

A. *Opinion in Ruffins v. State*, No. 03-18-00540-CR, 2020 Tex. App. LEXIS 6499 (Tex. App.—Austin 2020, pet. filed) (designated for publication).

Ruffins v. State

Court of Appeals of Texas, Third District, Austin

August 14, 2020, Filed

NO. 03-18-00540-CR

Reporter
2020 Tex. App. LEXIS 6499 *

Anthony Ruffins, Appellant v. The State of Texas, Appellee

Notice: PUBLISH

Prior History: [*1] FROM THE 207TH DISTRICT COURT OF COMAL COUNTY NO. CR2016-614, THE HONORABLE DWIGHT E. PESCHEL, JUDGE PRESIDING.

McMichael v. State, 2019 Tex. App. LEXIS 7862 (Tex. App. Austin, Aug. 29, 2019)

Disposition: Reversed and Remanded.

Core Terms

accomplice, corroborated, accomplice-witness, robbery, shop, codefendant, tattoo, jury-charge, footage, reasonable-doubt, invited, wearing, hat, surveillance, omission, non-accomplice, pet, egregious, concurrence, estopped, aggravated, guilt, night, estoppel, jurors, phones, weighs, masks, conspiracy, caution

Case Summary

Overview

HOLDINGS: [1]-Defendant's conviction for aggravated robbery under *Tex. Penal Code Ann. §§ 29.02* and *29.03* was improper because the jury charge was erroneous since it only required corroboration if it was shown beyond a reasonable doubt that a codefendant was an accomplice. This language of that instruction was not only inconsistent with case law and the Pattern Jury Charge, it was also inconsistent with the nature and treatment of accomplice testimony. The error was not harmless, in part because none of the victims could identify defendant as one of their attackers and all of the men committing the robbery were wearing masks.

Outcome
Judgment reversed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Jury Instructions

HN1[] **Preservation for Review, Failure to Object**

Stating that party has no objection to a jury charge is equivalent to a failure to object and does not prevent appellate review of jury-charge issue.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Jury Instructions

HN2[] Reversible Error, Jury Instructions

When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the alleged error resulted in any harm. The amount of harm needed for a reversal depends on whether a complaint regarding that error was preserved in the trial court. If no objection was made, which is essentially what occurred here, a reversal is warranted only if the error resulted in egregious harm. The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm. The analysis depends on the unique circumstances of each case and is factual in nature.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Accomplice Testimony

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN3[] Particular Instructions, Accomplice Testimony

Regarding whether there was error in the charge, the accomplice-witness rule in *Tex. Code Crim. Proc. Ann. art. 38.14* is essentially a legislative judgment that a reasonable doubt exists if the only evidence the State presents in satisfaction of its burden of proof is the testimony of an uncorroborated accomplice witness because an uncorroborated accomplice witness cannot by itself persuade to a level of confidence beyond a reasonable doubt. *Article 38.14* reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person and that an accomplice's motives in testifying against the accused may well include malice or an attempt to curry favor from the state in the form of a lesser punishment, or perhaps, no punishment. Accomplice-witness testimony as has been described as inherently untrustworthy; that testimony should be viewed with caution.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Accomplice Testimony

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Reasonable Doubt

Criminal Law & Procedure > Trials > Witnesses > Presentation

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN4[] Particular Instructions, Accomplice Testimony

Although the Texas Criminal Pattern Jury Charge states that it may not be necessary to include reasonable doubt language in an accomplice-witness instruction regarding whether a witness is an accomplice witness, it has also explained that if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration is required unless the State proves beyond a reasonable doubt that a witness is not an accomplice witness.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

Evidence > Burdens of Proof > Allocation

HN5[] Reversible Error, Jury Instructions

Neither side has the burden of establishing either the presence or a lack of harm with regard to a jury charge error. Instead, the reviewing court makes its own assessment when evaluating what effect an error had on the verdict by looking at the record before it. In assessing harm, reviewing courts consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors

present in the record.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > Miscellaneous Crimes

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN6[] Accessories, Aiding & Abetting

An accomplice is someone who could be charged for offense in question or lesser-included offense and further clarifying for direct party liability that witness is accomplice if he participates with a defendant before, during, or after the commission of the crime, acts with the requisite culpable mental state, and performs an affirmative act that promotes the commission of the offense with which the defendant is charged. If there is conflicting or inconclusive evidence that a witness was complicit in the crime, then the witness is an accomplice as a matter of fact.

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Accomplice Testimony

HN7[] Particular Instructions, Accomplice Testimony

Omission of accomplice witness instruction can result in egregious harm if corroborating evidence is unconvincing and renders State's case for conviction significantly less persuasive.

Counsel: For State: Mr. Sammy McCrary, Comal County Criminal District Attorney's Office, Mr. Joshua D. Presley, Assistant District Attorney, Mr. Clayten H. Hearrell, Assistant Criminal District Attorney Comal County, Texas, New Braunfels, TX.

For Appellant: Ms. Karen E. Oprea, The Law Office of Oprea & Weber, Austin, TX.

Judges: Before Justices Goodwin, Baker, and Kelly. Dissenting Opinion by Justice Goodwin. Concurring Opinion by Justice Baker.

Opinion by: Chari L. Kelly

Opinion

Anthony Ruffins was charged with the offense of aggravated robbery. *See* Tex. Penal Code §§ 29.02, .03. The indictment contained enhancement paragraphs alleging that Ruffins had four prior felony convictions. *See id.* § 12.42. At the end of the guilt-innocence phase, the jury found Ruffins guilty of the charged offense. Ruffins elected to have the trial court assess his punishment, and the trial court found the enhancement allegations to be true and sentenced him to life imprisonment. *See id.* In eleven issues on appeal, Ruffins asserts that the trial court erred by including multiple errors in the jury charge, failing to grant his motion for new trial, making a deadly weapon finding in its judgment, and imposing more court costs than were authorized. We will reverse the trial court's judgment of conviction and remand for further proceedings.

BACKGROUND

Ruffins was charged with committing aggravated robbery at a tattoo shop in New Braunfels, Texas. The indictment **[*2]** alleged that the following individuals also were involved: codefendant Olanda Taylor, codefendant Robert Ruffins,[1] and codefendant Kenneth McMichael. The alleged victim in this case was Sarah Zamora, who worked at the shop with her husband. At the time of the offense, a customer, Tony Hernandez, was in the shop. During the guilt-innocence phase, Zamora and Hernandez both testified. In addition, two law-enforcement officers—Officers Richard Groff and John Mahoney—testified regarding their investigation in

[1] Because Robert Ruffins and Anthony Ruffins share the same surname, we will refer to Robert Ruffins by his first name for ease of reading.

this case. Further, codefendant Gustavo Trevino provided testimony regarding the offense, including his role in facilitating the robbery, and David Hogarth testified regarding his knowledge of events leading up to and following the robbery. Audio and visual recordings from surveillance cameras inside the shop were also admitted into evidence.

The surveillance footage showed four African American men wearing masks entering the shop at night while carrying handguns and with several of the men wearing gloves. One man was wearing a white hat. Another man was wearing a dark shirt. The third man was wearing shorts with a red stripe. And the fourth man was wearing shorts with a white stripe. **[*3]** In addition, the footage showed the man in the white hat kick Zamora in the head before pointing a gun at her head and directing her to a cash register and to a safe where the man removed the safe from a cabinet before the man in the dark shirt placed the safe in a bag. The man in the white hat and the other three men are seen repeatedly kicking Hernandez's head and using their pistols to hit his head before dragging him around the floor. The footage shows the man in the dark shirt, the man wearing shorts with a red stripe, and the man wearing shorts with a white stripe leaving the shop and captures one of those men stating that it was time to leave before the man in the white hat is seen walking down the stairs and leaving the shop.

Zamora and Hernandez testified about the events on the night in question and the injuries that they and Zamora's husband sustained, but neither was able to identify Ruffins as one of the offenders. Zamora and Hernandez both testified that the offenders took their cell phones.

After Zamora and Hernandez testified, Officer Groff explained that in his initial investigation of this case, he used the "Find My iPhone" app to locate the two stolen phones and determined **[*4]** that the phones were in the custody of a woman and her son who lived at the Palms Apartments in San Antonio. Officer Groff testified that the woman explained that codefendant Taylor had given her the phones. Officer Groff also stated that the police found a safe in the dumpster of the apartment complex and that the safe was consistent with the one stolen from the tattoo shop.

Next, Officer Mahoney testified that his investigation in this case led him to believe that the following people were involved in the robbery: Ruffins and codefendants Taylor, McMichael, Trevino, and Robert. Further, Officer Mahoney stated that he learned through his investigation that Taylor, Robert, and Ruffins were all related. Next, Officer Mahoney stated that his review of surveillance footage of businesses near the tattoo shop showed a white Volvo driving toward the shop shortly before the robbery, and he learned in his investigation that codefendant Trevino owned a white Volvo.

Additionally, Officer Mahoney testified that he interviewed Taylor after the cell phones had been recovered and after codefendant Taylor had been arrested for a separate offense. Taylor provided information furthering his investigation. **[*5]** During his investigation, he reviewed Taylor's Facebook page to attempt to identify other suspects in the case, and his social media search led him to the Facebook pages for Ruffins and codefendants Robert and McMichael. Officer Mahoney related that he learned from Ruffins's page that Ruffins's nickname was "Poohbear," and when Officer Mahoney listened to the surveillance footage from the tattoo shop, he heard someone say, "Let's go, let's go, Poohbear" before the man in the white hat came down the stairs. Officer Mahoney described how Ruffins referred to codefendant McMichael as his "shooter" in a Facebook post months before the offense in which Ruffins used emojis for knives, guns, money, and money bags. Further, Officer Mahoney explained that his online research of the Facebook pages showed pictures of Ruffins and codefendants Robert and Taylor each wearing a white hat similar to the one in the surveillance footage. Officer Mahoney stated that although the four men in the surveillance footage were wearing masks, the footage captured a unique tattoo on one of the offender's arm, and Officer Mahoney explained that codefendant McMichael had a tattoo on his arm that looked like the **[*6]** one in the surveillance footage.

Moreover, Officer Mahoney testified that he learned from the Palms Apartments' residents that Hogarth was linked with some of the individuals discussed above and that he saw Ruffins talking with Hogarth when he drove to the apartment complex to talk to Hogarth but that Ruffins left before he approached Hogarth. Officer Mahoney stated that he learned that Hogarth had information related to the robbery and he obtained a search warrant for Hogarth's phone. The search of the phone revealed a text thread between Hogarth and codefendant Trevino in which Trevino told Hogarth what to tell the police, and that Trevino told Hogarth to get a lawyer. Further, Officer Mahoney testified that Hogarth initially was uncooperative and lied to the police about whether he knew anything about the offense but later

cooperated with the police by providing information about the offense and those involved. Similarly, Officer Mahoney related that Hogarth stated that he was afraid of Ruffins and that Ruffins had threatened to hurt him if he testified. Moreover, Officer Mahoney testified that he believed that Hogarth told Trevino's wife not to cooperate with the police. Officer **[*7]** Mahoney stated that Hogarth told him that he went to the tattoo shop with codefendants Taylor and Trevino days before the offense but that he did not learn that Taylor and Trevino were planning to rob the shop until they were driving home from the shop. When describing Hogarth's involvement in this case, Officer Mahoney testified that there was no evidence that Hogarth encouraged anyone to participate in the robbery or aided or attempted to aid anyone in the commission of the robbery.

Furthermore, Officer Mahoney stated that a search of Ruffins's father's apartment at the Palms Apartments led to the discovery of a gun and a pair of gloves. Additionally, Officer Mahoney recalled that when he showed codefendant Robert's mother a picture of the masked man in the white hat from the surveillance footage of the tattoo shop, she stated that the man was Robert and not Ruffins. Regarding Ruffins's arrest, Officer Mahoney stated that Ruffins did not react when shown the violent footage from the robbery. Further, Officer Mahoney testified that while Ruffins denied any involvement in the case, he also made unusual statements such as "[i]f you say I did it, I did it." Officer Mahoney related that **[*8]** Ruffins stated that he was with his girlfriend, Shante Benton, on the night of the offense but did not provide her contact information. When discussing Benton, Officer Mahoney mentioned that his search of Ruffins's Facebook page indicated that he was romantically involved with Benton, but Officer Mahoney did not attempt to contact Benton as part of his investigation.

In his testimony, Hogarth explained that he lived at the Palms Apartments around the time of the offense and that he associated with Ruffins and codefendants Taylor, Robert, and Trevino. Hogarth stated that Trevino and Taylor decided to rob Trevino's cousin's tattoo shop and that he rode with Trevino and Taylor to the tattoo shop days before the offense occurred. Additionally, Hogarth related that he was present during conversations in which Taylor, Robert, Ruffins, and Trevino made plans to rob the shop and that Ruffins recruited codefendant McMichael to help. Regarding the night of the offense, Hogarth recalled that he saw McMichael, Trevino, Taylor, and Ruffins drive off in a white Volvo. When he was shown a photo from the surveillance footage of the masked man in the white hat, Hogarth testified that the man in the **[*9]** photo was Ruffins and that Ruffins always wore that hat. But Hogarth also admitted on cross-examination that he previously told the police that he would just be guessing when asked the identity of the man in the white hat and that the man in the photo looked like someone other than Ruffins. Relatedly, Hogarth explained that although the men wore masks, he recognized the men when watching the surveillance footage by how they moved and how they sounded. Hogarth also related that he told the police everything he knew about the robbery and that Ruffins threatened to hurt him if he testified.

When called to testify, codefendant Trevino explained that he had already been convicted for his role in the tattoo shop robbery and that he entered into an agreement with the State in which he agreed to testify in this case in exchange for the State not recommending a punishment in his case in the hopes of a lesser punishment. Trevino also testified regarding his extensive criminal history. Further, Trevino related that his cousin owned the tattoo shop and that he decided to rob the shop because he needed money. Additionally, Trevino said that before the robbery he drove by the tattoo shop with Hogarth **[*10]** and codefendant Taylor, that he discussed the possibility of robbing the shop, that Hogarth was not part of the plan and just overheard the conversation between Trevino and Taylor, that Hogarth did not help anyone commit the robbery, and that he told Hogarth to get a lawyer and not talk to the police after the robbery. Regarding the offense, Trevino testified that he drove to the tattoo shop in his white Volvo with Ruffins and codefendants Taylor, McMichael, and Robert. Further, he related that the four passengers put on masks and gloves and had their guns ready and stated that Ruffins was wearing a white hat.

After the State finished its case in chief, Ruffins called Benton to the stand. In her testimony, Benton explained that she was dating Ruffins around the time of the offense, that he was with her the entire night of the robbery, and that she remembered the night of the offense because that night she was planning a birthday party for one of her children scheduled for the following day.

Once both sides rested, the jury charge was prepared. The charge contained an accomplice-as-a-matter-of-law instruction for Trevino and an accomplice-as-a-matter-of-fact instruction for Hogarth. After **[*11]** considering the evidence, the jury found Ruffins guilty of aggravated robbery.

DISCUSSION

In his first five issues on appeal, Ruffins asserts that the jury charge contained multiple errors. In his sixth through ninth issues on appeal, Ruffins contends that the trial court erred by denying his motion for new trial and by failing to issue findings of fact and conclusions of law regarding its ruling on his motion. In his tenth issue, Ruffins argues that the trial court erred by including a deadly weapon finding in its judgment of conviction. In his final issue on appeal, Ruffins urges that the trial court erred by imposing more court costs than were authorized. Because Ruffins's first issue is dispositive of this appeal, we turn to that issue now.

Jury Charge Error

In his first issue, Ruffins asserts that there is error in the trial court's jury charge setting out the accomplice-witness instructions for Hogarth. *See* Tex. Code Crim. Proc. art. 38.14. As set out above, the charge included an accomplice-as-a-matter-of-fact instruction for Hogarth, which reads, in relevant part, as follows:

> You must determine whether David Hogarth is an accomplice to the crime of aggravated robbery, if it was committed. If you determine that **[*12]** David Hogarth is an accomplice, you must then also determine whether there is other evidence corroborating the testimony of David Hogarth.
>
> . . .
>
> If you find beyond a reasonable doubt that David Hogarth is an accomplice to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth unless the testimony is corroborated.

On appeal, Ruffins contends that the "trial court erred by requiring proof beyond a reasonable doubt that . . . Hogarth was an accomplice and, by doing so, creating a presumption that he was not."

In its brief, the State contends that Ruffins may not argue that this portion of the charge is erroneous because he requested the "beyond a reasonable doubt" instruction and, therefore, is barred from challenging the instruction under the doctrine of invited error. *See* Prystash v. State, 3 S.W.3d 522, 531-32 (Tex. Crim. App. 1999). Having reviewed the record, we cannot agree with the State's assertion.

During the jury-charge conference, Ruffins stated that "there is nothing in the charge that gives them an instruction with respect to how they determine someone is an accomplice, and it has to be **[*13]** done with 'if you have a reasonable doubt or not,' in that respect." In response, the trial court stated that the charge already had an instruction directing the jury that "they have to find he is an accomplice beyond a reasonable doubt." Next, Ruffins stated that he did not "think there's been an instruction that they need to believe—when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice." At that point, the State read the portion of the jury charge summarized above instructing the jury that Hogarth's testimony must be corroborated if the jury determines beyond a reasonable doubt that Hogarth was an accomplice. When the State finished reading that part of the charge, Ruffins stated that he was "good" and did not provide further argument on the issue.

Although the State correctly highlights that part of the exchange summarized above showed that Ruffins mentioned that there was no instruction requiring the jury to determine beyond a reasonable doubt that Hogarth was an accomplice, the totality of Ruffins's objection indicates that he was requesting an instruction specifying that there must be evidence corroborating Hogarth's testimony if **[*14]** the jury had a reasonable doubt as to whether or not Hogarth was an accomplice. In any event, the instruction had already been included in the jury charge when Ruffins made his objection, and nothing in the remainder of the record indicates that any change was made to the charge as a result of his objection. Accordingly, we cannot agree that Ruffins's challenge is barred by the doctrine of invited error. However, by informing the trial court that he was "good" and by failing to further object to that portion of the jury charge, Ruffins effectively withdrew his objection to that part of the charge. *See* Bluitt v. State, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004)**HN1**[⬆] (explaining that stating that party has "no objection" to jury charge is "equivalent to failure to object" and does not prevent appellate review of jury-charge issue); Tyson v. State, 172 S.W.3d 172, 177 & n.2 (Tex. App.—Fort Worth 2005, pet. ref'd) (stating that party did not invite error to jury charge by stating, "[W]e believe it's charged properly").

HN2[⬆] When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether

the alleged error resulted in any harm. *See* Ngo v. State, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm needed for a reversal depends on whether a complaint regarding "that error was preserved in the trial **[*15]** court." Swearingen v. State, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd). If no objection was made, which is essentially what occurred here, a reversal is warranted only if the error "resulted in 'egregious harm.'" *See* Neal v. State, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008) (quoting *Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)* (op. on reh'g)). "The purpose of the egregious-harm inquiry is to ascertain whether the defendant has incurred actual, not just theoretical, harm." Swearingen, 270 S.W.3d at 813. The analysis depends "on the unique circumstances of" each case and "is factual in nature." *See* Saenz v. State, 479 S.W.3d 939, 947 (Tex. App.—San Antonio 2015, pet. ref'd).

HN3[↑] Regarding whether there was error in the charge, we note as an initial matter that the Court of Criminal Appeals has explained that the accomplice-witness rule in article 38.14 of the Code of Criminal Procedure is essentially "a legislative judgment that a reasonable doubt exists if the only evidence the State presents in satisfaction of its burden of proof is the testimony of an uncorroborated accomplice witness" because "an uncorroborated accomplice witness cannot by itself persuade to a level of confidence beyond a reasonable doubt." Castillo v. State, 913 S.W.2d 529, 535 n.3 (Tex. Crim. App. 1995). Similarly, this Court has explained that article 38.14 "reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person" and **[*16]** that an "accomplice's motives in testifying against the accused may well include malice or an attempt to curry favor from the state in the form of a lesser punishment, or perhaps, no punishment." Wincott v. State, 59 S.W.3d 691, 698 (Tex. App.—Austin 2001, pet. ref'd); *see also id.* (describing accomplice-witness testimony as "inherently untrustworthy" and warning that testimony "should be viewed with caution").

Consistent with the legislature's recognition of the problems surrounding the trustworthiness of accomplice-witness testimony, one of our sister courts of appeals has explained that a proper accomplice instruction should inform the jury that if "they have a reasonable doubt regarding whether or not the witness acted as [an] accomplice, then corroboration is necessary." Haney v. State, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997, no pet.). Similar "reasonable doubt" language has been included in numerous jury charges reviewed by various appellate courts. *See, e.g.,* Cyr v. State, 308 S.W.3d 19, 24 (Tex. App.— San Antonio 2009, no pet.); Elliott v. State, 976 S.W.2d 355, 358 n.4 (Tex. App.—Austin 1998, pet. ref'd); *see also* Estrada v. State, No. 08-15-00271-CR, 2018 Tex. App. LEXIS 4885, 2018 WL 3193498, at *3 (Tex. App.—El Paso June 29, 2018, pet. ref'd) (op., not designated for publication); Losoya v. State, No. 05-10-00396-CR, 2012 Tex. App. LEXIS 5103, 2012 WL 2402609, at *6 (Tex. App.—Dallas June 27, 2012, pet. ref'd) (op., not designated for publication). HN4[↑] Although the Texas Criminal Pattern Jury Charge states that it may not be necessary to include "reasonable doubt" language in an accomplice-witness instruction regarding whether **[*17]** a witness is an accomplice witness, it has also explained that if an instruction requiring proof beyond a reasonable doubt is included, it should state that corroboration *is required unless* "the [S]tate proves beyond a reasonable doubt that a witness is not an accomplice witness." *See* Comm'n on Pattern Jury Charges, State Bar of Tex., Texas Criminal Pattern Jury Charges: Special Instructions CPJC 3.4 (2018).

The charge at issue in this case essentially inverts this requirement by only requiring corroboration if it is shown beyond a reasonable doubt that Hogarth is an accomplice. This language of this instruction is not only inconsistent with case law and the Pattern Jury Charge, it is also inconsistent with the nature and treatment of accomplice testimony. *See* Holladay v. State, 709 S.W.2d 194, 196 (Tex. Crim. App. 1986). Accordingly, we conclude that the charge at issue in this case was erroneous.

Having determined that there was error, we must now address whether Ruffins was harmed by that error. Ngo, 175 S.W.3d at 743. HN5[↑] Neither side has the burden of establishing either the presence or a lack of harm. *See* Warner v. State, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008). Instead, the reviewing court makes "its own assessment" when evaluating what effect an error had on the verdict by looking at the record before it. Ovalle v. State, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000) (quoting **[*18]** Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 1165 (2d ed. 1992)). In assessing harm, reviewing courts "consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record." Reeves v. State, 420 S.W.3d

812, 816 (Tex. Crim. App. 2013); *see also* State v. Ambrose, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016) (setting out these factors in issue regarding error from omission of accomplice-witness instruction); Ratliff v. State, No. 03- 18-00569-CR, 2020, S.W.3d , 2020 Tex. App. LEXIS 1270, WL 746642, at *15, *16 (Tex. App.—Austin Feb. 14, 2020, no pet. h.) (applying these factors to issue of whether jury-charge error constituted "an impermissible comment on the weight of the evidence").

Regarding the charge as a whole, we observe that nothing in the remainder of the charge corrected the error set out above or otherwise indicated that corroboration is required if the jury has a reasonable doubt as to whether Hogarth was an accomplice. Accordingly, we believe that this factor weighs in favor of finding that Ruffins was harmed by the erroneous omission.

Regarding the arguments of counsel, we note that the State emphasized the testimony from Hogarth and codefendant Trevino when arguing that Ruffins was one of the individuals involved in the robbery. In fact, the State characterized **[*19]** Hogarth's testimony as the most important evidence that was presented during the trial, explained that the case depended on the information that Hogarth gave the police, and related that if Hogarth had not identified Ruffins and the codefendants, the case "would have gone in a totally different direction." Similarly, Ruffins described Hogarth as the State's "main witness." Although both sides stated that Hogarth's testimony would need to be corroborated if Hogarth was an accomplice, the State repeated the error present in the charge by asserting that the jury had to determine beyond a reasonable doubt that Hogarth was an accomplice before his testimony needed to be corroborated. Accordingly, we believe that this factor also weighs in favor of a finding that Ruffins was harmed by the jury-charge error.

Turning to the evidence, we note that identity was a central issue in this case and that the State relied heavily on the testimony from codefendant Trevino and Hogarth in connecting Ruffins to the robbery of the tattoo shop. Moreover, the evidence presented at trial established that Trevino was an accomplice because he was convicted for his role in the robbery, and conflicting evidence **[*20]** was presented regarding whether Hogarth was also an accomplice. In his testimony, Hogarth denied going to the tattoo shop on the night of the offense and further denied soliciting, encouraging, or directing anyone to commit the robbery. Similarly, Hogarth denied aiding or attempting to aid in the robbery, and he asserted that he was not arrested because he did not assist in the robbery. Moreover, although Hogarth admitted that he went to the tattoo shop with codefendants Taylor and Trevino before the offense occurred and that Taylor and Trevino mentioned wanting to rob the tattoo shop, Hogarth related that he did not know of the possibility of someone robbing the shop until he was already in the car, that he thought the three of them were just going for a ride when he got in the car, and that he did not go inside the shop when they drove to New Braunfels.

In addition, Trevino testified that he, Taylor, and Hogarth went to the tattoo shop before the robbery occurred and that he discussed the possibility of robbing the shop, but he stated that Hogarth was not part of the plan to rob the tattoo shop and that Hogarth did not attempt to aid in the commission of the robbery or encourage anyone **[*21]** to commit the robbery. Furthermore, Officer Mahoney explained that he concluded that Hogarth was not criminally responsible for the robbery based on his investigation, that he had no information from which to conclude that Hogarth planned the robbery or encouraged anyone to participate in the robbery, and that although Hogarth admitted to going to the tattoo shop before the robbery, Hogarth stated that he did not learn of any plan to rob the shop until after the other people in the car left the shop.

On the other hand, Hogarth also admitted that the trip to the tattoo shop was a scouting mission "for [Trevino] and [Taylor] and [him] to do this robbery in New Braunfels" and explained that he was present in subsequent conversations when Ruffins and codefendants Taylor, Robert, and Trevino were discussing robbing the shop in the near future. In addition, when asked whom *he* was planning to rob, Hogarth answered by saying Trevino's "cousin . . . [a]t the tattoo shop." Moreover, Trevino explained that he told Hogarth to consult with a lawyer based on his involvement in the case. When asked whether Hogarth had lied during Trevino's trial, Trevino stated that Hogarth previously testified that **[*22]** "we went into the shop." Further, Trevino related that Hogarth was with him shortly before he and the others went to rob the tattoo shop and that after the robbery Hogarth expressed to Trevino his disappointment that they left him behind to go and commit the robbery without him. Trevino also testified regarding an earlier incident in which Hogarth offered to help him steal some drugs by informing him about a guy who was selling drugs.

Additionally, Officer Mahoney explained that Hogarth initially lied to the police about knowing Ruffins and tried to mislead the police. Further, Officer Mahoney testified that Hogarth admitted that he had been asked to participate in the robbery, that he obtained a search warrant to search Hogarth's phone, and that the search revealed that Trevino had been instructing Hogarth on what to tell the police. When describing his investigation, Officer Mahoney stated that he learned that a man told Trevino's wife not to cooperate with the police and that he suspected the man was Hogarth.

In light of the evidence summarized above, including Hogarth's admission that he went on a scouting trip for the robbery and Trevino's testimony that Hogarth was disappointed **[*23]** that he did not get to be part of the actual robbery, the jury could have had reasonable doubt regarding whether Hogarth was an accomplice as that term has been defined by the Court of Criminal Appeals. *See* Zamora v. State, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013) **HN6**[] (explaining that accomplice is someone who could be charged for offense in question or lesser-included offense and further clarifying for direct party liability that witness is accomplice if he "'participates with a defendant before, during, or after the commission of the crime,' 'acts with the requisite culpable mental state,' and performs an 'affirmative act that promotes the commission of the offense with which the defendant is charged'" (quoting Cocke v. State, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006)); *see also* Castillo v. State, 517 S.W.3d 363, 372 (Tex. App.—Eastland 2017, pet. ref'd) (explaining that "if there is conflicting or inconclusive evidence that a witness was complicit in the crime, then the witness is an accomplice as a matter of fact"). However, as set out above, the jury charge only instructed the jury to determine if Hogarth's testimony was corroborated if it was shown beyond a reasonable doubt that Hogarth was an accomplice.[2] In essence, the flawed instruction created a presumption that corroboration *wasn't* required unless it was proved beyond a reasonable doubt that Hogarth *was* an accomplice, **[*24]** when the reverse should have been true: corroboration *was* required unless it was proved beyond a reasonable doubt that Hogarth *wasn't* an accomplice.

Moreover, although some corroborating evidence was presented, the evidence of Ruffins's guilt other than the testimony from Trevino and Hogarth was less than overwhelming. *See* Campbell v. State, 227 S.W.3d 326, 331 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (determining that defendant was not egregiously harmed by alleged jury-charge error, in part, because "overwhelming weight of the evidence supported the jury's verdict"); *see also* Reed v. State, 550 S.W.3d 748,

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[2] In its brief, the State asserts that there is no harm regarding any of the alleged errors in the instructions pertaining to Hogarth because, according to the State, the evidence presented at trial established that Ruffins was not entitled to an accomplice-in-fact instruction regarding Hogarth because "[m]erely being present . . ., having knowledge of the planned offense but failing to disclose it, and even concealing the offense does not turn a witness into an accomplice witness." *See* Delacerda v. State, 425 S.W.3d 367, 396 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Similarly, the State argues that the evidence establishing that a defendant lied to the police after the crime was committed is not an act assisting in the commission of the offense. *See id.* Accordingly, the State contends that the charge was unwarranted and, therefore, that the inclusion of the charge, even if erroneous, benefitted Ruffins.

However, there was also evidence that Hogarth was uncooperative with the police, subjectively believed that he might be criminally responsible for the robbery, and directed another not to cooperate with the police. This evidence raises an issue as to whether Hogarth performed an affirmative act promoting the commission of the aggravated robbery with the requisite intent when he went to the tattoo shop with Taylor and Trevino. *Cf.* Hedrick v. State, 473 S.W.3d 824, 830, 831 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (explaining that evidence showing "[a] consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt" and that evidence regarding defendant's conduct after commission of crime can indicate consciousness of guilt); Bryan v. State, 990 S.W.2d 924, 928 (Tex. App.—Beaumont 1999, no pet.) (noting that "[e]vidence of attempts to suppress or fabricate evidence proves consciousness of guilt"). Moreover, the evidence set out in the body of the opinion would allow the jury to have a reasonable doubt regarding whether Ruffins performed an affirmative act promoting the commission of the offense and is, therefore, distinguishable from the evidence in the case that the State primarily relies on. *See* Druery v. State, 225 S.W.3d 491, 499-500 (Tex. Crim. App. 2007) (noting that evidence at trial showed, among other things, that defendant told two witnesses that he was going to kill victim, took the victim's property after shooting victim, and gave witnesses some money after the shooting; explaining that witnesses "mere presence," knowledge of planned offense, and failure to disclose it did not render them accomplice witnesses, particularly where evidence indicated that neither witness believed defendant would actually go through with shooting, that neither witness distracted victim "to help facilitate the murder," and that neither witness asked for money; and concluding that evidence did not indicate that witnesses were accomplices as matter of law or fact).

758 (Tex. App.—Texarkana 2018, no pet.)* (explaining that fact that evidence might be sufficient to support determination that accomplice witness's testimony was corroborated when viewed in light most favorable to verdict does not answer question of whether defendant suffered egregious harm); *cf.* *Nghia Van Tran, 870 S.W.2d 654, 658* (Tex. App. — Houston [1st Dist.] 1994, pet. ref'd) (finding harm from omission of accomplice instruction where record indicated that "there is good reason to believe the jury did use" potential accomplice's testimony and where "the corroborating evidence" was not "so strong that any reasonable jury would have found it to be true").

Even though Officer Mahoney testified that there was a picture on Facebook of Ruffins **[*25]** wearing a white hat that is similar to the one seen in the surveillance footage, Officer Mahoney also stated that there were photos showing codefendants Robert and Taylor both wearing a similar white hat and that Robert's mother stated that the man wearing the hat in a photo from the surveillance footage was Robert and not Ruffins. Additionally, even though Officer Mahoney's investigation of the Facebook pages pertaining to the individuals charged in this offense showed an interaction between Ruffins and codefendant McMichael, that interaction occurred months before the charged offense. Similarly, although Officer Mahoney testified that he saw Ruffins interacting with Hogarth at the Palms Apartments, that interaction was not "at or near the time or place of" the offense. *See* *Hernandez v. State, 939 S.W.2d 173, 178 (Tex. Crim. App. 1997)*. In addition, even though Officer Mahoney testified that Ruffins did not react when he saw the surveillance footage and made strange statements during his questioning by the police, Officer Mahoney also explained that Ruffins denied any involvement in the crime. In addition, although Officer Mahoney testified that the police found a weapon and gloves in Ruffins's father's home, no evidence was introduced regarding **[*26]** whether the gun or gloves were used in the offense. Moreover, even though Officer Mahoney testified that someone can be heard saying "let's go, Poohbear" on the surveillance footage, the audio portion for that part of the footage is not entirely clear as the State partially conceded in its closing arguments.

Further, none of the victims could identify Ruffins as one of their attackers, and all of the men committing the robbery were wearing masks. No evidence was presented that Ruffins's fingerprints or DNA were found in the tattoo shop, that Ruffins's cellphone connected to any cell towers near the tattoo shop at the time of the offense, or that the safe found in the dumpster of the Palms Apartments was the one taken from the tattoo shop. Additionally, no evidence was presented that the police found a white hat in Ruffins's possession, and no non-accomplice evidence linked Ruffins to the white Volvo. Finally, Ruffins had an alibi, as Benton testified that Ruffins was with her at the time of the robbery and that she remembered that night well because she was planning her daughter's birthday party scheduled for the following day.

In light of the preceding, we conclude that the third factor **[*27]** also weighs in favor of a determination that Ruffins was harmed by the jury-charge error. *Cf.* *Ambrose, 487 S.W.3d at 598* (providing that ***HN7***[↑] omission of accomplice witness instruction can result in egregious harm if corroborating evidence is unconvincing and renders State's case for conviction significantly less persuasive); *Casanova v. State, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012)* (stating that corroborating evidence that is weak because it depends on inferences from evidentiary facts to ultimate facts that jury may readily reject may result in egregious harm); *Reed, 550 S.W.3d at 758* (noting that strength of corroborating evidence is function of how believable it is and how compellingly it connects accused to offense).

Turning to the fourth factor, nothing in our review of the record has revealed any other relevant information bearing upon our harm analysis.

Given our resolution of the factors listed above, we conclude that the jury-charge error egregiously harmed Ruffins. For these reasons, we sustain Ruffins's first issue on appeal. Because we have sustained Ruffins's first issue, we need not address his remaining issues.

CONCLUSION

Having sustained Ruffins's first issue on appeal, we reverse the trial court's judgment of conviction and remand for further proceedings.

Chari L. Kelly, Justice **[*28]**

Before Justices Goodwin, Baker, and Kelly

Dissenting Opinion by Justice Goodwin

Concurring Opinion by Justice Baker

Reversed and Remanded

Filed: August 14, 2020

Publish

Concur by: Thomas J. Baker

Concur

CONCURRING OPINION

I join the Court's opinion concluding that there was error in the jury charge and that the error harmed Anthony Ruffins. I write separately to express my belief that there was additional error in the jury charge.

In his fifth issue, Ruffins asserts that there is error in the trial court's jury charge setting out the accomplice-witness instructions for David Hogarth and codefendant Gustavo Trevino. *See* Tex. Code Crim. Proc. art. 38.14. The charge specified that "[a] person cannot be convicted of a crime on the uncorroborated testimony of an accomplice." As set out in the Court's opinion, the charge included instructions specifying that Trevino was an accomplice as a matter of law. Specifically, the charge provides, in relevant part, as follows:

> Gustavo Trevino is an accomplice to the crime of aggravated robbery if it was committed. The defendant, Anthony Ruffins, therefore cannot be convicted on the testimony of Gustavo Trevino unless that testimony is corroborated.

The charge also included an accomplice-as-a-matter-of-fact instruction **[*29]** for Hogarth, which reads, in relevant part, as follows:

> You must determine whether David Hogarth is an accomplice to the crime of aggravated robbery, if it was committed. If you determine that David Hogarth is an accomplice, you must then also determine whether there is other evidence corroborating the testimony of David Hogarth.

On appeal, Ruffins acknowledges that the accomplice instructions contained a corroboration requirement but contends that the accomplice instructions were erroneous because they failed to instruct the jury that "it must determine whether or not Trevino and Hogarth's testimony was both true and showed [his] guilt before using the testimony to convict." When addressing an issue regarding an alleged jury-charge error, appellate courts must first decide whether there is error before addressing whether the alleged error resulted in any harm. *See* Ngo v. State, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

For well over a century, Texas has enacted statutes requiring that an accomplice witness's testimony be corroborated. One of the earliest statutes provided that "a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; **[*30]** and the corroboration is not sufficient if it merely shows the commission of the offense." *See* Blakeley v. State, 24 Tex. Ct. App. 616, 7 S.W. 233, 235 (Tex. App. 1888) (quoting statute in effect at time). The most recent codification in article 38.14 of the Code of Criminal Procedure is nearly identically worded. *See* Tex. Code Crim. Proc. art. 38.14. When explaining what should be included in an accomplice-witness instruction in a jury charge to fully effect this statutory requirement, the Court of Criminal Appeals provided the following example of a properly worded accomplice-witness charge: "Now, you cannot convict the defendant upon [an accomplice's] testimony alone, unless you first believe *that his testimony is true*, and connects the defendant with the offense charged, and then you cannot convict the defendant upon said testimony, unless you further believe that there is other testimony in the case, corroborative of the accomplice's testimony, tending to connect the defendant with the offense charged; and the corroboration is not sufficient if it merely shows the commission of the offense charged." *Campbell v. State, 57 Tex. Crim. 301, 123 S.W. 583, 584 (Tex. Crim. App. 1909)* (emphasis added). In *Campbell*, the Court also explained that it had approved language in other charges, and both of the cases cited by the Court had charges requiring the jury to believe the accomplice's testimony. *Id.* (citing *Brown v. State, 57 Tex. Crim. 570, 124 S.W. 101, 103-04 (Tex. Crim. App. 1909)*; *King v. State, 57 Tex. Crim. 363, 123 S.W. 135, 139 (Tex. Crim. App. 1909))* **[*31]** . When later describing the example instruction that it included in its opinion in *Campbell*, the Court of Criminal Appeals stated that it included the example "with a view of furnishing trial courts with an accurate" accomplice-witness instruction to avoid error in the future. *See* Wadkins v. State, 58 Tex. Crim. 110, 124 S.W. 959, 961 (Tex. Crim. App. 1910) (explaining that Court in *Campbell* "set out in haec verba an approved charge" on law of accomplice testimony).

In light of the above requirements, the Court of Criminal Appeals has repeatedly stated that it is error for an accomplice-witness instruction not to inform the jury (1) that it could not convict a defendant based on the

testimony of an accomplice unless the testimony is corroborated and (2) that the jury must believe the accomplice's testimony to convict. *See* Jones v. State, 44 Tex. Crim. 557, 72 S.W. 845, 846 (Tex. Crim. App. 1903). Additionally, the Court has explained that the failure to include the second type of instruction listed above is error because the absence of the instruction constitutes an impermissible comment on the weight of the evidence. *Id.* Essentially, the Court reasoned that a charge without that instruction assumed "the truth of the accomplice's evidence" by directing "the jury that, if they believe the testimony of the accomplice has been corroborated, they could convict. In other words, the charge simply requires the jury to believe that the accomplice has been corroborated, thus suggesting to them the truth of the accomplice's testimony." *Id.* Consistent **[*32]** with this holding, the Court issued several opinions reversing convictions where the jury charge failed to instruct the jury that it had to believe that an accomplice's testimony is true. *See* Wadkins, 124 S.W. at 961; Crenshaw v. State, 48 Tex. Crim. 77, 85 S.W. 1147, 1148 (Tex. Crim. App. 1905); *see also* Doyle v. State, 138 Tex. Crim. 17, 133 S.W.2d 972, 973 (Tex. Crim. App. 1939) (noting that objection to jury charge for failing to instruct that jury must believe "the testimony of these accomplices to be true" was "well taken" and referring to authority saying that failure to include this instruction is erroneous).

Consistent with that prior case law, the Court of Criminal Appeals and various intermediate courts have continued to explain that proper accomplice-witness instructions should include directives requiring that juries believe an accomplice witness in addition to determining that the witness's testimony is corroborated before convicting a defendant. *See* Farris v. State, 819 S.W.2d 490, 507 (Tex. Crim. App. 1990) (determining that accomplice-witness instruction was proper because it "made clear that the jury had to find . . . that the accomplice witness['s] . . . testimony was true" and that accomplice witness's testimony was corroborated), *overruled on other grounds by Riley v. State, 889 S.W.2d 290, 298 (Tex. Crim. App. 1993)* (on reh'g); Holladay v. State, 709 S.W.2d 194, 199 (Tex. Crim. App. 1986) (deciding that accomplice-witness instruction was proper because it told jury that it could not find defendant guilty unless **[*33]** it found, among others things, that "*the testimony of [the accomplice] was truthful*" and that there was evidence "outside of [the accomplice]'s testimony[] that tended to connect the appellant to the commission of the" crime) (emphasis added); Davis v. State, No. 06-15-00011-CR, 2015 Tex. App. LEXIS 12662, 2015 WL 8953889, at *4, *5 (Tex. App.—Texarkana Dec. 16, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that instruction that included requirement that jury find accomplice's testimony "is true" complied with requirements set out by Court of Criminal Appeals); Tuma v. State, No. 04-00-00522-CR, 2002 Tex. App. LEXIS 93, 2002 WL 21962, at *2 (Tex. App.—San Antonio Jan. 9, 2002, no pet.) (op., not designated for publication) (same); *see also* Ferguson v. State, 573 S.W.2d 516, 524 (Tex. Crim. App. 1978) (noting that "the charge did not allow the jury to convict without believing the accomplice witness's testimony"); George E. Dix & John M. Schmolesky, 43A Texas Practice: Criminal Practice and Procedure § 51:93 (3d ed. 2019) (warning that improper accomplice instructions could allow conviction on basis of accomplice's testimony alone provided that it is corroborated by obscuring jury's need to evaluate accomplice's testimony and stating that, to avoid this problem, "the jury charge should inform the jurors that they cannot find the accused guilty on the testimony of the accomplice witness unless **[*34]** they find, first, that the testimony of the witness is true"); Michael J. McCormick, Thomas D. Blackwell, and Betty Blackwell, 8 Tex. Prac., Criminal Forms and Trial Manual §§ 108.2, .3 (11th ed. 2020) (commenting that jury instructions should specify that defendant cannot be convicted "upon the testimony of an accomplice unless the jury first believe that the accomplice's evidence is true").

In fact, several of our sister courts of appeals have explained that when the State elicits testimony from an accomplice to prove a defendant's guilt, "the defendant is entitled to an instruction that a conviction cannot be based on the accomplice testimony unless the jury believes the testimony to be true, and unless there is other evidence tending to connect the defendant to the offense." Scales v. State, No. 04-12-00435-CR, 2014 Tex. App. LEXIS 1744, 2014 WL 667506, at *11 (Tex. App.—San Antonio Feb. 19, 2014, pet. ref'd) (mem. op., not designated for publication); Fritz v. State, No. 07-06-00206-CR, 2008 Tex. App. LEXIS 3996, 2008 WL 2229533, at *2 (Tex. App.—Amarillo May 30, 2008, pet. ref'd) (mem. op., not designated for publication); Simmons v. State, 205 S.W.3d 65, 76 (Tex. App.—Fort Worth 2006, no pet.). *But see* Herron v. State, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002) (addressing issue regarding omission of entire accomplice-witness instruction and explaining that this type of instruction "informs the jury that it cannot use the accomplice witness testimony unless there is also some non-accomplice **[*35]** evidence connecting the defendant to the offense" and that purpose of instruction is fulfilled if that type of non-accomplice evidence exists).

Similarly, multiple intermediate courts of appeals have observed that "[t]he purpose of the" accomplice evidence rule is to ensure that a "jury does not consider accomplice" evidence unless the jury finds *both* that the accomplice "is telling the truth and that other evidence corroborates the accomplice." *See* Nolley v. State, 5 S.W.3d 850, 852 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Nghia Van Tran v. State, 870 S.W.2d 654, 658 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Moreover, many appellate courts have quoted from jury charges requiring juries believe that the accomplice witness's testimony is true as part of the accomplice-witness instruction. *See, e.g.,* Gill v. State, 873 S.W.2d 45, 47 (Tex. Crim. App. 1994); Golden v. State, 851 S.W.2d 291, 293-94 (Tex. Crim. App. 1993); Yost v. State, 222 S.W.3d 865, 873 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); Jester v. State, 62 S.W.3d 851, 855 (Tex. App.—Texarkana 2001, pet. ref'd); Wallace v. State, No. 03-97-00823-CR, 1999 Tex. App. LEXIS 2574, 1999 WL 189961, at *5 & n.4 (Tex. App.—Austin Apr. 8, 1999, no pet.) (op., not designated for publication); Elliott v. State, 976 S.W.2d 355, 357-58 & n.4 (Tex. App.—Austin 1998, pet. ref'd). Consistent with this case law, the Texas Criminal Pattern Jury Charges, until relatively recently, included instructions requiring the jury to believe that an accomplice's testimony is true before convicting. *Compare* Comm'n on Pattern Jury Charges, State Bar of Tex., Texas Criminal Pattern Jury Charges: Special Instructions CPJC 3.3 (2015), *with* Comm'n on Pattern Jury Charges, State Bar of Tex., Texas Criminal Pattern Jury Charges: Special Instructions **[*36]** CPJC 3.3 (2018).

In its brief, the State contends that case law has established that the type of omission at issue here is not error if the charge included an instruction on reasonable doubt as to the whole case. As support for this proposition, the State cites White v. State, 385 S.W.2d 397 (Tex. Crim. App. 1964). In that case, the Court of Criminal Appeals summarized one of the issues on appeal as asserting "that the trial court erred in failing to charge the jury that they must believe that the testimony of the accomplice witness was true beyond a reasonable doubt" and concluded that there was no error because another portion of the jury charge properly set out "the law of reasonable doubt . . . as to the whole case." Id. at 400. Although the Court of Criminal Appeals did not quote from the charge in *White* except for the global reasonable-doubt portion, it explained that the charge "was in substance the same as given in" *Stovall v. State, 104 Tex. Crim. 210, 283 S.W. 850 (Tex. Crim. App. 1925)*. The charge at issue in *Stovall* specified that the jury "could not convict on the testimony of the accomplice Green unless they believed the same to be true," and the Court of Criminal Appeals overruled the defendant's assertion that this portion of the charge was erroneous for failing to require the jury to believe the accomplice's **[*37]** testimony "beyond a reasonable doubt" because there was a reasonable-doubt instruction later in the charge. *Id. at 853*. In light of the Court of Criminal Appeals' characterization of the issue and charge in *White* as being the same as in *Stovall*, I surmise that the charge in *White* required the jury to believe the accomplice-witness testimony but did not include the terms "reasonable doubt" in that particular instruction. Accordingly, I cannot agree with the State's assertion that the omission at issue here was not error because there was a reasonable-doubt instruction in another portion of the charge. On the contrary, both *White* and *Stovall* support a determination that the jury charge in this case should have but did not include an instruction requiring the jury to believe the accomplice testimony.

In light of the preceding case law, I would conclude that the failure to include an instruction requiring the jury to believe the accomplice-witness testimony from Hogarth and Trevino before relying on it was error. In addition, because this error and the error discussed in the Court's opinion regarding the inclusion of a reasonable-doubt instruction both pertain to the accomplice-witness instructions, **[*38]** I believe that the omission described above further compounded the harm described by the Court in its opinion.

For example, in addition to the problems with the jury charge the Court identifies in its opinion, nothing in the remainder of the charge specified that the jury had to believe the testimony of an accomplice witness before it could use that testimony to convict. Although the charge included an instruction specifying that the jury was the exclusive judge of the credibility of all of the witnesses and the weight to give their testimonies, the Court of Criminal Appeals has specifically rejected the argument that this type of instruction cures the error stemming from the omission at issue. *See* Jones, 72 S.W. at 846. Therefore, the charge incorrectly allowed the jury to convict based on corroborated accomplice-witness testimony without also believing that testimony was true and, as set out in the Court's opinion, instructed the jury that it only needed to consider whether the testimony from Hogarth was corroborated if it first determined beyond a reasonable doubt that he was an accomplice.

Accordingly, based on my review of the charge, I believe that the entirety of the charge strongly weighs in

favor **[*39]** of finding that Ruffins was harmed in this case. Similarly, the Court reasons that the arguments of counsel weighed in favor of a finding of harm because the State emphasized the testimony from Hogarth and Trevino when arguing that Ruffins was one of the individuals involved in the robbery and because the State further argued that the jury only had to consider whether Hogarth's testimony was corroborated if it first determined beyond a reasonable doubt that Hogarth was an accomplice. In addition to those arguments, I note that neither the State nor Ruffins specifically argued that the jury was required to first believe the testimony of an accomplice witness before that testimony could be used as a basis for convicting Ruffins if properly corroborated.

Accordingly, I believe that the arguments of counsel weigh in favor of a finding that Ruffins was harmed.

Regarding the evidence presented at trial, the Court explains that identity was a central issue in the case, that the State relied on the testimony from Hogarth and Trevino as evidence that Ruffins was one of the individuals involved in the robbery, that the jury could have had a reasonable doubt regarding whether Hogarth was also an **[*40]** accomplice based on the evidence presented at trial, and that the evidence of Ruffins's guilt from sources other than the testimonies of Trevino and Hogarth was not overwhelming. Additionally, I note that although the evidence of Ruffins's guilt separate from the testimonies of Trevino and Hogarth was not overwhelming, some evidence potentially corroborated the testimony of Hogarth and Trevino, which under the jury charge would have erroneously allowed the jury to convict Ruffins based on the accomplice testimony without also believing the accomplice testimony to be true.

In light of the preceding, I believe that the third factor also weighs strongly in favor of a determination that Ruffins was egregiously harmed by the jury-charge errors.

Regarding the fourth factor, nothing in my review of the record has revealed any other relevant information bearing upon the harm analysis.

Given the resolution of the factors listed above, I conclude that the jury-charge errors individually and in aggregate egregiously harmed Ruffins. Accordingly, I would sustain Ruffins's fifth issue on appeal as well as his first issue.

For these reasons, I concur in the Court's judgment reversing the trial court's **[*41]** judgment of conviction and remanding for further proceedings.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, Kelly

Filed: August 14, 2020

Publish

Dissent by: Melissa Goodwin

Dissent

DISSENTING OPINION

As this case demonstrates, accomplice-witness instructions are complicated and, in several respects, the law as to what should, should not, must, or must not be included in them is unclear.

This Court's majority opinion concludes that the jury charge contained error with respect to the reasonable-doubt instruction in the application paragraph of the accomplice-witness instruction relating to Hogarth, and that Ruffins suffered egregious harm from that error.

In his concurring opinion, Justice Baker agrees that Ruffins suffered egregious harm from that alleged jury-charge error but also concludes that additional error was present in the jury charge based on the omission of language directing the jury to first find the accomplice-witness testimony to be true in the accomplice-witness instructions as to both Hogarth and Trevino.

I disagree that either of the alleged errors identified in these opinions supports reversal of the trial court's judgment of conviction.

Dissent to Majority Opinion

After the charge conference, **[*42]** during the objections to the charge, the following discussion occurred:

> [RUFFINS]: You know what, I just thought of something. I'm sorry, Judge. I still think that, with a question of fact, that the instruction "therefore, if you believe" — the application instruction, "therefore, if you believe from the evidence beyond

a reasonable doubt that an offense was committed and you further believe from the evidence that the witness" — in this case it would be David Hogarth — "was an accomplice or you have a reasonable doubt whether he was or was not as the term is defined in the foregoing instructions, then you cannot convict the Defendant upon the testimony of — unless you further believe that there is other evidence in the case outside of testimony of David Hogarth tending to connect the Defendant with the offense charged in the indictment." And then, "From the all the evidence, you must believe beyond a reasonable doubt that the Defendant is guilty" —
. . . (bailiff reports presence of all twelve jurors returning from break)

[RUFFINS]: — because there is nothing in the charge that gives them an instruction with respect to how they determine someone is an accomplice, and it has to be done **[*43]** with "if you have a reasonable doubt or not," in that respect.
[STATE]: I'm not sure I followed most of what [defense counsel] just said there.
[RUFFINS]: Well, you should be familiar with that, because that's from Houston.
COURT: And it says in there they have to find that he is an accomplice beyond a reasonable doubt.
[STATE]: And, Judge, I would say, then, "from all the evidence you must believe beyond a reasonable doubt the Defendant is guilty" is already covered abundantly in the charge.
[RUFFINS]: That part certainly is.
[STATE]: Okay.
[RUFFINS]: But I don't think there's been an instruction that they need to believe — when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice. I don't think that's in here.
COURT: I thought it was.
[RUFFINS]: Unless I'm wrong. I mean, I — let me see here. I don't — I don't see it.

[STATE]: "If you find beyond a reasonable doubt that David Hogarth is an accomplice to the crime of aggravated robbery, you must consider whether there is evidence corroborating the testimony of David Hogarth. The Defendant, Anthony Ruffins, cannot be convicted on the testimony of David Hogarth, unless that testimony is corroborated." **[*44]**
[RUFFINS]: I'm good.
COURT: Okay.
[STATE]: And, Judge, for the record, that was on page 8.
COURT: Yeah. Okay. I thought it was in there.

Citing to portions of this exchange, the State contends that Ruffins is estopped under the doctrine of invited error from complaining about error in the reasonable-doubt instruction given, which he contends erroneously placed the burden of proving Hogarth was an accomplice on him rather than the State. The majority rejects the State's argument.

The majority concludes that the doctrine of invited error does not bar Ruffins from complaining about the reasonable-doubt instruction given because the instruction at issue was already in the jury charge when Ruffins objected to the omission of a reasonable-doubt instruction and requested his reasonable-doubt instruction, and no changes were made to the jury charge in response to his objection and requested instruction. However, no changes were made because, as the majority notes, Ruffins informed the trial court he was "good" and made no further objections.

The majority characterizes Ruffins's actions—commenting that he was "good" and not objecting further—as "withdrawing his objection." But, in context, his "good" **[*45]** comment reflected that he was "good" with the instruction. After the jury-charge instruction at issue was read to him—word for word in open court—in response to his requested reasonable-doubt instruction, Ruffins said, "I'm good," thereby communicating to the trial court his acceptance of the now complained-of instruction. He had made a request for a particular reasonable-doubt instruction but accepted an alternate instruction that differed from what he requested. In doing so, he accepted as "good" the allegedly erroneous instruction.

That his "good" comment was accepting the allegedly erroneous instruction is particularly evident when this objection is read in the context of the charge conference as a whole. Throughout the charge conference, Ruffins objected to the jury charge by requesting various instructions that specified what words and phrases he sought as well as by requesting a particular order for the instructions to be given in the charge.[1] Given the

[1] For example, Ruffins objected to the omission of language referring to the statute in the instruction setting forth the accomplice-witness rule—that is, he requested that the instruction "say '38.14.'" (The trial court denied that requested language.) He also objected to the accomplice-witness instruction relating to Trevino, requesting that the phrase "as a matter of law" be added to the instruction telling the jury that

specificity and particularity of his other objections to the jury charge, his communication to the trial court that he was "good" was a comment that he was "good" with the instruction at issue and constituted not only an acceptance **[*46]** of the instruction but an affirmation that the allegedly erroneous instruction sufficed to address his requested instruction.

Under the doctrine of invited error, a defendant cannot invite or cause error and then complain about it on appeal. *See* Cary v. State, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016) (explaining that "the law of invited error estops a party from making an appellate error of an action it induced" (quoting Prystash v. State, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999))); Woodall v. State, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) (explaining that "[t]he law of invited error provides that a party cannot take advantage of an error that it invited or caused, even if such error is fundamental"); Prystash, 3 S.W.3d at 531 (explaining that "invited error" "is part of the definition of what can constitute error, and quite reasonably defines error of which a party may complain as excluding those actions of the trial court actually sought by the party in that tribunal" (quoting George E. Dix and Robert O. Dawson, 43 *Texas Practice—Criminal Practice and Procedure* § 42.141 (Supp. 1999))). While it is true that the complained-of reasonable-doubt instruction was in the jury charge before Ruffins requested his reasonable-doubt instruction, I am not convinced that, given his affirmative acceptance of the allegedly erroneous instruction, Ruffins did not "invite," or at least join in inviting, **[*47]** the alleged error. The reason the trial court stopped addressing that particular instruction—and left it in the form Ruffins now complains about—was because Ruffins indicated to the court that he was "good." The record reflects that, based on the discussion that followed Ruffins's objection and request for a reasonable-doubt instruction and Ruffins's actions during that discussion, the trial court believed that the jury charge addressed Ruffins's objection and the specific concern he raised.[2]

However, even if Ruffins's complaint is not barred by the doctrine of invited error, as the majority contends, the doctrine of invited error is simply one form of estoppel. *See* Prystash, 3 S.W.3d at 531 (describing doctrine of invited error as species of estoppel). "Estoppel is a flexible doctrine that takes many forms." Deen v. State, 509 S.W.3d 345, 348 (Tex. Crim. App. 2017); *see* Murray v. State, 302 S.W.3d 874, 882 (Tex. Crim. App. 2009) ("[E]stoppel is a flexible doctrine that manifests itself in various forms that are not limited to unilateral requests." (quoting Rhodes v. State, 240 S.W.3d 882, 891 (Tex. Crim. App. 2007))); *see also* Rhodes, 240 S.W.3d at 891 (observing that, in *Prystash*, court dealt "with a type of estoppel involving unilateral requests that result in 'invited error,' but estoppel is a flexible doctrine that manifests itself in various forms that are not limited to unilateral requests").

Under the **[*48]** doctrine of estoppel, a party may be estopped from asserting a claim that is inconsistent with that party's prior conduct. *Arroyo v. State, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003)*; State v. Yount, 853 S.W.2d 6, 9 (Tex. Crim. App. 1993); *see* State v. Stewart, 282 S.W.3d 729, 739-40 (Tex. App.—Austin 2009, no pet.) (explaining that basis for estoppel ruling is that "the estopped party was asserting a claim or taking a position that was inconsistent with the party's earlier conduct in the same cause"); *see, e.g., Arroyo, 117 S.W.3d at 798* (holding that State was estopped from challenging admissibility of defense exhibits that were certified copies of criminal records summarized in rap sheet produced by State); Jones v. State, 119 S.W.3d 766, 784 (Tex. Crim. App. 2003) (holding that appellant was estopped from complaining about trial court's discharge of juror when appellant had proposed discharge as alternative to mistrial); Yount, 853 S.W.2d at 9 (holding that defendant who requested and received jury-charge instruction on lesser included

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Trevino was an accomplice. (The trial court denied that request.) In objecting to the instruction defining sufficient corroboration—which stated, "Evidence is sufficient to corroborate the testimony of an accomplice if that evidence tends to connect the Defendant, Anthony Ruffins, with the commission of any offense."—he requested the phrase "any offense" be changed to "aggravated robbery." (The prosecutor suggested changing the phrase to "the offense," and Ruffins agreed.)

[2] When Ruffins first made this objection and requested a reasonable-doubt instruction, which included the language he now complains was missing from the instruction given, the trial judge said that a reasonable-doubt instruction was in the jury charge: "[I]t says in there they have to find that he is an accomplice beyond a reasonable doubt." Ruffins expressed that he did not think such an instruction was in the charge—"But I don't think there's been an instruction that they need to believe — when they consider accomplice, they have to agree beyond a reasonable doubt that he is an accomplice. I don't think that's in here."—and the trial judge again indicated that he "thought it was." The instruction was then read by the prosecutor, and Ruffins said he was "good." The prosecutor informed the trial judge which page the instruction was on, and the judge said, "Yeah. Okay. I thought it was in there."

offense was estopped from complaining on appeal that conviction for lesser included offense was barred by limitations), *overruled in part by* McKinney v. State, 207 S.W.3d 366, 373-74 (Tex. Crim. App. 2006) (restricting application of estoppel rule as it applies to sufficiency challenges for lesser included offenses).

Here, the record reflects that, knowing full well the exact content of the reasonable-doubt instruction in the court's jury charge (because it had just been read verbatim in open court), **[*49]** Ruffins accepted the allegedly erroneous instruction. He did not remain silent on the issue, simply fail to object to the instruction, or assert "no objection" to the charge; nor did he merely "withdraw his objection." Rather, when he expressed that he was "good" with the instruction, he affirmatively communicated to the court that the instruction at issue sufficed and, in doing so, overtly abandoned his requested instruction—that is, he accepted the allegedly erroneous instruction in lieu of his requested instruction.

Under the circumstances present here, I believe that Ruffins is estopped from complaining about error in the reasonable-doubt accomplice-witness jury-charge instruction. *See, e.g.*, Woodard v. State, 322 S.W.3d 648, 659 (Tex. Crim. App. 2010) (concluding that record "fairly" reflected that appellant had some responsibility for challenged instruction and, thus, appellant was precluded from raising complaint regarding instruction for first time on appeal).

Even were Ruffins not estopped from complaining on appeal about the instruction at issue—contending that it erroneously omitted language informing the jury that if they had a reasonable doubt as to whether Hogarth was an accomplice, corroborating evidence was required—I am uncertain **[*50]** that this omission is error.

The accomplice-witness statute places no burden on either party to prove—beyond a reasonable doubt or otherwise—the accomplice status. The majority indicates that not only is proof beyond a reasonable doubt required, but that if such proof is not provided, the law requires corroborating evidence. That is, the majority maintains that corroborating evidence is required if the jury has a reasonable doubt as to whether a witness is an accomplice. While this may be a sound policy, given the theory underlying the accomplice-witness rule, such a requirement is not in the statute. The statute requires corroboration of the testimony of "an accomplice." *See* Tex. Code Crim. Proc. art. 38.14 ("A conviction cannot be had upon the testimony of *an accomplice* unless corroborated by other evidence . . . ." (emphasis added)). It does not say "an accomplice or a possible accomplice," "a suspected accomplice," "someone who might be an accomplice," or even "someone the jury is unsure about whether the person is an accomplice."

Further, while such an instruction may have been given and upheld in some cases, and the majority cites cases that do so, that does not mean that the law requires that such an instruction **[*51]** be given. *See* Comm. on Pattern Jury Charges, State Bar of Tex., Texas Criminal Pattern Jury Charges: Special Instructions, CPJC 3.4 (2018) (observing that "[e]xisting practice is often to instruct jurors that corroboration is required unless the state proves beyond a reasonable doubt that a witness is not an accomplice witness" but stating that "[t]here seems neither need nor justification for imposing a requirement of proof beyond a reasonable doubt" (citations omitted)).

Assuming that such an instruction is erroneous, I have concerns about the harm analysis performed by the majority.

While any type of harm analysis involves the evaluation of evidence,[3] *see* Herron v. State, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002) ("[A]ll harmless error applications, including that prescribed by *Almanza*, are essentially empirical inquiries concerning the effect of flaws and mistakes on the particular strengths and weaknesses of individual cases." (quoting Saunders v. State, 817 S.W.2d 688, 690 (Tex. Crim. App. 1991))), I

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[3] For example, assessing the harmfulness of the omission of an accomplice-witness instruction is a function of the strength of the corroborating evidence. *See* Casanova v. State, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012). In assessing the strength of the non-accomplice evidence, courts examine (1) its reliability or believability, and (2) the strength of its tendency to connect the defendant to the crime. State v. Ambrose, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016) (citing Herron v. State, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002)). "Under the egregious harm standard, the omission of an accomplice witness instruction is generally harmless unless the corroborating (non-accomplice) evidence is 'so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive.'" Ambrose, 487 S.W.3d at 598 (quoting Herron, 86 S.W.3d at 632). Although the majority does not appear to apply this standard here, in support of its conclusion that Ruffins suffered egregious harm, it cites to cases analyzing harm related to the omission of an accomplice-witness instruction under this standard.

am concerned that the Court is placing itself too far in the role of factfinder.

The majority discounts the testimony of Detective Mahoney (whose demeanor the jury was able to observe during his testimony), the video of the security footage (which the jury was able to review for itself), the digital **[*52]** evidence (such as Facebook posts), the evidence recovered from the apartments (like the firearm and gloves), and Ruffins's suspicious statements during the investigation. *See, e.g.,* Smith v. State, 332 S.W.3d 425, 447 (Tex. Crim. App. 2011) ("Though each of the facts discussed above, considered individually, would not satisfy Article 38.14, the cumulative force of the non-accomplice evidence, giving proper deference to the jury's resolution of the facts, tends to connect [appellant] to the murders."); *cf. Mitchell v. State, 650 S.W.2d 801, 807 (Tex. Crim. App. 1983)* (explaining that "combined cumulative weight of the incriminating evidence furnished by the non-accomplice witnesses which tends to connect the accused with the commission of the offense supplies the test").

Yet, the majority affords credibility to Ruffins's alibi witness (his girlfriend, who waited until trial to establish his alibi) and Ruffins's self-serving denials. *Cf.* Simmons v. State, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009) (recognizing that, in sufficiency review, "when there are two permissible views of the evidence (one tending to connect the defendant to the offense and the other not tending to connect the defendant to the offense), appellate courts should defer to that view of the evidence chosen by the fact-finder"); Brown v. State, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008) (explaining that in determining whether non-accomplice evidence tends to connect **[*53]** defendant to commission of offense, "we view the evidence in the light most favorable to the jury's verdict").

While our role as an appellate court conducting a harm analysis for jury-charge error involves evaluating the strength and weaknesses of the evidence, I think at some point an appellate court crosses the line when it substitutes its own credibility assessments and fact determinations for those of the jury. I fear that line has been crossed here.

We are dealing with two standards. "Egregious harm is a 'high and difficult standard' to meet, and such a determination must be 'borne out by the trial record.'" Villarreal v. State, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (quoting Reeves v. State, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (citations omitted)); *accord* Marshall v. State, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); Taylor v. State, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). The "tends-to-connect" standard, however, does not present a high threshold.[4] Turner v. State, 571 S.W.3d 283, 287 (Tex. App.—Texarkana 2019, pet. ref'd); Cantelon v. State, 85 S.W.3d 457, 461 (Tex. App.—Austin 2002, no pet.); *see* Solomon v. State, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001); *see also* Malone v. State, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (observing that corroborating evidence "must simply link the accused in some way to the commission of the crime"). I think the Court is substituting its own fact findings to lower the standard for egregious harm and raise the standard for corroboration. I understand that harm in this context may relate to the strength of the non-accomplice evidence. *See* Casanova v. State, 383 S.W.3d 530, 539 (Tex. Crim. App. 2012); Herron, 86 S.W.3d at 632. But this is not a situation where the accomplice-witness instruction was completely **[*54]** omitted. In this case, the issue of Hogarth's status as accomplice and the need for corroborating evidence for accomplice-witness testimony were presented to the jury in the court's charge. The fact that the jury deliberated on the issue of guilt less than two and a half hours suggests that this was not an issue the jury struggled with.

Finally, I think the majority fails to keep in mind that under an *Almanza* egregious-harm standard, an appellant must have suffered some actual—rather than merely theoretical—harm. *See* Chambers v. State, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019); Marshall, 479 S.W.3d at 843. The majority's conclusion that "the jury *could* have had a reasonable doubt regarding whether Hogarth was an accomplice" (emphasis added) because of the alleged error in the accomplice-witness instruction is, in my view, merely theoretical harm.

Because I conclude that Ruffins is estopped from challenging the reasonabledoubt instruction at issue, have doubts about the law concerning the burden of proof regarding the accomplice status (and jury-charge instructions related to any such burden), and have the above concerns about the majority's egregious-harm analysis, I respectfully dissent from the majority opinion.[5]

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[4] The majority acknowledges that "some corroborating evidence was presented" but laments that the evidence of guilt outside of the testimony of the accomplice-witness testimony was "less than overwhelming."

[5] I have the same concerns with the egregious-harm analysis

Comment in Response to Concurring Opinion

Although the majority **[*55]** opinion is dispositive of this appeal, I write separately to address Justice Baker's concurrence in this published opinion.

Can a conviction be "had upon" testimony that is believed by a jury to be not true? Does the law require an instruction to jurors that they cannot convict on accomplice-witness testimony that they do not believe to be true? That is essentially the instruction at issue in the concurrence.

A conviction is a finding of guilt beyond a reasonable doubt. Implicit in an instruction to jurors that they must believe that the accomplice-witness testimony is true is the idea that the jury would or could convict based on such testimony (properly corroborated) if the jurors did not believe it to be true. This defies logic. All evidence supporting a finding of guilt—that is, evidence the conviction is "had upon"—is based on the jury's belief that the supporting evidence is true. I find it implausible that a finding of guilt beyond a reasonable doubt would be based on testimony not believed to be true. Thus, an instruction telling the jury that it cannot base its decision about guilt (a finding beyond a reasonable doubt) on untrue testimony—which is essentially what the instruction **[*56]** at issue here does—is unwarranted, and I do not believe such an instruction is required by law. I disagree with the concurring opinion indicating the contrary.

I am concerned about the concurrence's reliance on cases from more than a century ago—which predate *Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)* (op. on reh'g) (setting forth procedure for appellate review of claim of jury-charge error), and *Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)* (categorizing rights and establishing framework for which rights are subject to procedural default), *overruled on other grounds by Cain v. State, 947 S.W.2d 262 (Tex. Crim. App. 1997)*, and fail to take into account a long history of changing instructions relating to accomplice-witness testimony, *see, e.g., Holladay v. State, 709 S.W.2d 194, 198 (Tex. Crim. App. 1986)* (observing that requirement of materiality of corroborating evidence in instruction "has come and gone several times" in that "[b]efore the turn of the century, a jury charge need not have instructed that the corroboration relate to 'some material matter'" but that "by the 1940's, corroboration of 'all material facts' was necessary" (internal citations omitted)).

It is true that, in *Campbell v. State*, decided in 1909, the Court of Criminal Appeals explained what "should" be included in an accomplice-witness jury-charge instruction to effectuate the accomplice-witness rule, now codified **[*57]** in *article 38.14 of the Code of Criminal Procedure. See 57 Tex. Crim. 301, 123 S.W. 583, 584 (Tex. Crim. App. 1909)* (reversing conviction for crime of seduction "on account of the error in the charge of the court on the subject of accomplice" and providing form of accomplice-witness instruction, stating that "the following form of charge should be given, and same is hereby in terms approved as a correct charge"). In the years immediately following, when reviewing complaints about accomplice-witness instructions, the court approved of the use of the *Campbell* instruction, or those substantially similar, *see, e.g., Ice v. State, 84 Tex. Crim. 509, 208 S.W. 343, 345 (Tex. Crim. App. 1919)*; *Tindel v. State, 80 Tex. Crim. 14, 189 S.W. 948, 950 (Tex. Crim. App. 1916)*; *Grimes v. State, 77 Tex. Crim. 319, 178 S.W. 523, 526 (Tex. Crim. App. 1915)*; *McCue v. State, 75 Tex. Crim. 137, 170 S.W. 280, 286 (Tex. Crim. App. 1913)*; *Oates v. State, 67 Tex. Crim. 488, 149 S.W. 1194, 1198 (Tex. Crim. App. 1912)*; *Martinez v. State, 61 Tex. Crim. 29, 133 S.W. 881 (Tex. Crim. App. 1911)*, and urged its use by the trial courts, *see, e.g., Long v. State, 62 Tex. Crim. 540, 138 S.W. 401 (Tex. Crim. App. 1911)*; *Jordan v. State, 62 Tex. Crim. 388, 137 S.W. 114, 115 (Tex. Crim. App. 1911)*; *Grant v. State, 60 Tex. Crim. 358, 132 S.W. 350, 352 (Tex. Crim. App. 1910)*; *Thorp v. State, 59 Tex. Crim. 517, 129 S.W. 607, 610 (Tex. Crim. App. 1910)*.

However, in due course, the instruction fell under criticism for various reasons and was deemed to be inaccurate, inadequate, and inappropriate. *See, e.g., Lightfoot v. State, 128 Tex. Crim. 281, 80 S.W.2d 984, 986-87 (Tex. Crim. App. 1935)*; *Schlesinger v. State, 121 Tex. Crim. 517, 50 S.W.2d 319, 320-21 (Tex. Crim. App. 1932)*; *Morse v. State, 106 Tex. Crim. 520, 293 S.W. 568 (Tex. Crim. App. 1927)*; *McGary v. State, 99 Tex. Crim. 142, 268 S.W. 475, 476 (Tex. Crim. App. 1925)*; *Abbott v. State, 94 Tex. Crim. 31, 250 S.W. 188, 190 (Tex. Crim. App. 1923)*. The use of the *Campbell* instruction was discouraged, *see, e.g., Bass v. State, 62 S.W.2d 127 (Tex. Crim. App. 1933)* ("The charge in *Campbell v. State* . . . is not correct, and should not be given[.]"), and ultimately, in 1950, the Court of Criminal Appeals rejected and overruled the instruction, *see Green v. State, 155 Tex. Crim. 43, 231 S.W.2d 433, 436*

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in the concurring opinion. I do not repeat my concerns in my remarks concerning that opinion.

(Tex. Crim. App. 1950) ("Campbell v. State, supra, is no longer 'an approved form' of instruction on accomplice testimony, and in that regard is expressly overruled.").

Further, unlike the concurrence, I am not convinced that the Court of Criminal Appeals **[*58]** has "repeatedly stated" that the failure to include an instruction about first believing the accomplice witness's testimony to be true is itself an impermissible comment on the weight of the evidence that constitutes error. The concurrence relies on *Jones v. State*, decided in 1903, in which the court concluded that the instruction complained of, which did not instruct the jury that it had to first believe the accomplice's testimony to be true, was a comment on the weight of the testimony. *See* 44 Tex. Crim. 557, 72 S.W. 845, 846 (Tex. Crim. App. 1903). However, the *Jones* opinion based its holding on Bell v. State, 39 Tex. Crim. 677, 47 S.W. 1010, 1011 (Tex. Crim. App. 1898), and the jury charge in that case.

In *Bell*, an 1898 cattle theft case, the accomplice witness, a man named John Pelt, described his commission of the offense with appellant—which the State maintained was "theft in pursuance of a conspiracy." 47 S.W. at 1011. The trial court gave a charge on theft generally, a charge on "theft in pursuance of a conspiracy," the "usual charge defining who were accomplices," and then instructed the jury,

> Now, you are charged that the witness John Pelt was an accomplice according to his own testimony, as that term is defined in the foregoing instruction; and you are further instructed that you cannot find the defendant guilty upon **[*59]** his testimony, unless you are satisfied that the same has been corroborated by other evidence tending to establish that the defendant did in fact commit the offense.

Id. In responding to appellant's objection "to that part of the charge on accomplice testimony which stated to the jury that Pelt was an accomplice on his own testimony," the Court of Criminal Appeals explained,

> We understand appellant's contention to be that the court's charge on accomplice testimony was on the weight of the evidence,—that is, that the matter of conspiracy between Pelt and appellant depended alone on Pelt's testimony, which was denied by appellant; that, on the doctrine of accomplices, Pelt might be an accomplice with the appellant by virtue of being a co-conspirator with him, and that, consequently, the effect of the court's charge was to tell the jury that it was true, as had been testified to by Pelt, that he was a co-conspirator with appellant; that this was upon the weight of testimony[.]

Id. The court concluded that "the jury were [sic] liable to regard Pelt as an accomplice by virtue of his testimony regarding the conspiracy between himself and appellant; and then to be told, in effect, that Pelt's **[*60]** testimony as to the conspiracy was true, was a charge upon the weight of the testimony." *Id.* It was not the absence of an instruction about finding the accomplice-witness testimony to be true that rendered the instruction a comment on the weight of the evidence. Rather, it was the factual circumstances under which the trial court instructed the jury that Pelt was an accomplice "according to his own testimony." The only way Pelt could have been an accomplice was by participating in the alleged conspiracy as he described in his testimony. Thus, the instruction that Pelt was an accomplice was, essentially, also an instruction that his testimony was truthful and that he was a co-conspirator.

The court then addressed appellant's contention that "the charge as framed by the [trial] court was upon the weight of the testimony, because it assumed as true the truth of the accomplice's testimony throughout, and then only required that the jury find that the state had introduced other testimony tending to corroborate the same." Id. at 1012. The court agreed and cautioned that "[i]n every case where an accomplice testifies, the judge should be careful not to assume in any manner the truth of the accomplice's **[*61]** testimony, but leave the truth of that, as well as all other, evidence, to be found by the jury." *Id.* The court then suggested that

> in some method [the jurors] should be clearly told, if they believed the accomplice's testimony to be true, and that it showed or tended to show that defendant was guilty of the offense, still they could not convict unless they further believed that there was other testimony, outside of the accomplice testimony, tending to connect defendant with the commission of the offense charged.

Id. From this statement, the "requirement" for language in the accomplice-witness instruction telling the jury that it must first believe the accomplice-witness testimony to be true seems to have emerged.[6] However, the court

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[6] In chronological order, *see, e.g.*, Jones v. State, 44 Tex. Crim. 557, 72 S.W. 845, 846 (Tex. Crim. App. 1903) (citing *Bell*); Hart v. State, 47 Tex. Crim. 156, 82 S.W. 652, 653 (Tex. Crim. App. 1904) (citing *Bell* and *Jones*); Washington v. State, 47 Tex. Crim. 131, 82 S.W. 653, 654 (Tex. Crim. App. 1904) (citing *Bell* and *Jones*); Harrison v. State, 47 Tex. Crim. 393,

did not provide a requisite instruction nor mandate the inclusion of such an instruction in the accomplice-witness instruction. *Cf.* Geesa v. State, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991) (expressly adopting instruction on "reasonable doubt" and mandating its submission to juries), *overruled by* Paulson v. State, 28 S.W.3d 570 (Tex. Crim. App. 2000). I believe the notion that an accomplice-witness instruction lacking language directing the jury to first find the accomplice-witness testimony to be true itself may constitute an impermissible comment on the weight of **[*62]** the testimony (and, therefore, is erroneous) arises from a misinterpretation of this 1898 case.

The cases following *Bell* seem to involve a similar flaw. For example, in *Jones*, upon which the concurrence relies, the trial court instructed the jury that "the uncontradicted evidence before you shows that, if [the deceased] was murdered, Sam Tittsworth was an accomplice to said murder." 72 S.W. at 846. Similar to *Bell*, by instructing the jury that the "uncontroverted evidence" showed that Tittsworth was an accomplice, the court essentially instructed the jury that the uncontroverted evidence showed that Tittsworth's testimony was true. It was the manner in which the trial court instructed the jury that the witness was an accomplice as a matter of law that rendered the instruction a comment on the weight of the evidence (by assuming the truthfulness of the accomplice witness's testimony in characterizing **[*63]** it as "uncontroverted evidence") not the absence of the "first believe to be true" instruction.

I also disagree with the concurrence's statement that the Court of Criminal Appeals and various intermediate courts have "continued to explain the proper accomplice-witness instructions should include directives requiring that juries believe an accomplice witness in addition to determining that the witness's testimony is corroborated before convicting a defendant." While it is true that the cases cited by the concurrence are cases in which the accomplice-witness instruction at issue contained a "first believe to be true" component, the legal issue in those cases was unrelated to that part of the instruction and instead concerned different aspects of the instruction.

Both *Farris* and *Holladay* addressed the issue of whether an instruction that the accomplice witness's testimony must be corroborated as to the specific elements that make the crime of murder capital murder (the aggravating element) was required under article 38.14. *See* Farris v. State, 819 S.W.2d 490, 507 (Tex. Crim. App. 1990), *overruled on other grounds by Riley v. State, 889 S.W.2d 290 (Tex. Crim. App. 1993)*; Holladay, 709 S.W.2d at 195. The court in both cases found that a corroborating instruction as to the aggravating element of capital murder was not required and that the **[*64]** accomplice-witness instruction given was "more than adequate to satisfy the requirements of Art. 38.14," Holladay, 709 S.W.2d at 199, and "satisfie[d] the requirements of Art. 38.14," Farris, 819 S.W.2d at 507.

In *Davis*, the accomplice-witness instruction used the phrase "other testimony" rather than the statutory phrase "other evidence" when instructing about the corroboration requirement. *See* Davis v. State, No. 06-15-00011-CR, 2015 Tex. App. LEXIS 12662, 2015 WL 8953889, at *3-5 (Tex. App.—Texarkana Dec. 16, 2015, pet. ref'd) (mem. op., not designated for publication). The court concluded that the instruction did not improperly limit consideration of non-accomplice evidence and concluded that the instruction given "was sufficient under Article 38.14." 2015 Tex. App. LEXIS 12662, [WL] at *5. In *Tuma*, the issue was the omission of language that "the corroboration is not sufficient if it merely shows the commission of the offense" and language stating that the jury must believe beyond a reasonable doubt from all of the evidence that appellant is guilty. *See* Tuma v. State, No. 04-00-00522-CR, 2002 Tex. App. LEXIS 93, 2002 WL 21962, at *1 (Tex. App.—San Antonio Jan. 9, 2002, no pet.) (mem. op., not designated for publication). The court concluded that the

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83 S.W. 699, 704 (Tex. Crim. App. 1904) (citing *Bell* and *Jones*); Crenshaw v. State, 48 Tex. Crim. 77, 85 S.W. 1147, 1148 (Tex. Crim. App. 1905) (citing *Bell, Jones*, *Hart*, and *Washington*); Garlas v. State, 48 Tex. Crim. 449, 88 S.W. 345, 346 (Tex. Crim. App. 1905) (citing *Hart* and *Crenshaw*); Barton v. State, 49 Tex. Crim. 121, 90 S.W. 877 (Tex. Crim. App. 1905) (citing *Garlas, Crenshaw*, *Hart, Jones*, and *Bell*); Reagan v. State, 49 Tex. Crim. 443, 93 S.W. 733, 734 (Tex. Crim. App. 1906) (citing *Bell, Jones*, *Hart, Washington*, *Crenshaw*, and *Garlas*); Carbough v. State, 49 Tex. Crim. 452, 93 S.W. 738 (Tex. Crim. App. 1906) (citing *Bell*, *Jones, Hart*, *Washington, Crenshaw*, and *Barton*); Oates v. State, 50 Tex. Crim. 39, 95 S.W. 105, 106 (Tex. Crim. App. 1906) (citing *Barton, Garlas*, *Crenshaw, Hart*, *Jones, Washington*, and *Bell*); Jordan v. State, 51 Tex. Crim. 145, 101 S.W. 247 (Tex. Crim. App. 1907) (citing *Bell, Jones*, *Garlas, Hart*, *Crenshaw*, *Washington, Barton*, and *Oates*). These are just a few examples of the chain of citation, each building upon prior cases, that cite *Bell* and the immediately succeeding case(s) without consideration of *Bell*'s actual holding or of its unique facts or legal issues that rendered the instruction given an impermissible comment on the weight of the evidence.

instruction "met the test" of the instruction the Court of Criminal Appeals found to be "sufficient" in *Holladay*. *2002 Tex. App. LEXIS 93, [WL] at *2*.

Finally, the issue in *Ferguson* was the omission of appellant's requested instruction on circumstantial evidence. **[*65]** *See Ferguson v. State, 573 S.W.2d 516, 524 (Tex. Crim. App. 1978)*. The court found that because the instruction given "did not allow the jury to convict without believing the accomplice witness' [sic] testimony, there was no necessity to charge on the circumstantial nature of the nonaccomplice [sic] incriminating evidence." *Id.* However, that case was decided before the court dispensed with the necessity of instructing the jury on the law of circumstantial evidence, *see Hankins v. State, 646 S.W.2d 191, 200 (Tex. Crim. App. 1981)*, under a different legal framework, which included the reasonable-alternative-hypothesis construct for reasonable doubt, and at a time when circumstantial evidence was deemed weaker than direct evidence. Further, the court did not address the propriety of giving the instruction about first believing the accomplice-witness testimony to be true or state that such an instruction was required; it just noted the impact of the instruction given—that because it was given, "there was no necessity to charge on the circumstantial nature of the nonaccomplice [sic] incriminating evidence." *Ferguson, 573 S.W.2d at 524*.

The fact that the courts have held that the accomplice-witness instructions given in a particular case, which included language about first believing the accomplice-witness testimony to be true, "satisfied" **[*66]** the *article 38.14* requirements does not equate to a holding that such language is statutorily required to be included in every accomplice-witness instruction.

In addition, I find the concurrence's reliance on *Scales, Fritz*, and *Simmons* to be problematic. First, the issue before our sister courts in those cases was the absence of an instruction that a confidential informant's testimony must be corroborated, in conformity with *article 38.141*, which provides a corroboration requirement similar to *article 38.14* for a conviction of a drug offense on the testimony of a confidential informant working with law enforcement. *See Scales v. State, No. 04-12-00435-CR, 2014 Tex. App. LEXIS 1744, 2014 WL 667506, at *11* (Tex. App.— San Antonio Feb. 19, 2014, pet. ref'd) (mem. op., not designated for publication); *Fritz v. State, No. 07-06-0206-CR, 2008 Tex. App. LEXIS 3996, 2008 WL 2229533, at *2* (Tex. App.—Amarillo May 30, 2008, pet. ref'd) (mem. op., not designated for publication); *Simmons v. State, 205 S.W.3d 65, 76 (Tex. App.— Fort Worth 2006, no pet.)*; *see also Tex. Code Crim. Proc. art. 38.141*. The issue in those cases was the entitlement to an instruction at all, not the form of the instruction. Further, *Scales* and *Fritz* cite to and rely on *Simmons* in support of the statement quoted by the concurrence. *See Scales, 2014 Tex. App. LEXIS 1744, 2014 WL 667506, at *11*; *Fritz, 2008 Tex. App. LEXIS 3996, 2008 WL 2229533, at *2*. In support of the quoted statement in *Simmons*, the Fort Worth court cited *Green v. State, 72 S.W.3d 420, 423 (Tex. App.—Texarkana 2002, pet. ref'd)*, *disapproved of on other grounds by Zamora v. State, 411 S.W.3d 504, 514 n.6 (Tex. Crim. App. 2013)*, a case from the Texarkana Court of Appeals. *Green* simply addressed the issue of **[*67]** when a defendant is entitled to an accomplice-witness instruction (that is, when a witness is an accomplice as a matter of law or a matter of fact). *Id.* In its discussion, the Texarkana court did not state that the defendant is entitled to an instruction "that a conviction cannot be based on the accomplice testimony unless the jury believes the testimony to be true," as the Fort Worth court did. The *Green* opinion makes no mention of the purported requirement that the jury be instructed that it must first find the accomplice-witness testimony to be true.

I also find the concurrence's reliance on *Nolley* and *Tran* for the idea that the purpose of the accomplice-witness rule is to ensure that "a jury does not consider accomplice evidence unless the jury finds *both* that the accomplice is telling the truth and that other evidence corroborates the accomplice" to be problematic. *See Tran v. State, 870 S.W.2d 654, 658 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)*. In *Nolley*, the Fourteenth Court of Appeals cites to *Tran* in support of this position. *See Nolley v. State, 5 S.W.3d 850, 852 (Tex. App.—Houston [14th Dist.] 1999, no pet.)*. In *Tran*, the First Court of Appeals makes the assertion without citation to any authority whatsoever. *See 870 S.W.2d at 658*. I believe the purpose of the rule can be determined by looking to the statute itself, which, by its plain language, **[*68]** addresses only corroboration. *See, e.g., Gosch v. State, 829 S.W.2d 775, 777 (Tex. Crim. App. 1991)* (observing that if combined cumulative weight of other evidence tends to connect accused with commission of offense, "then the mandate of *Article 38.14* has been fulfilled").

The accomplice-witness rule, embodied in *article 38.14*, is a statutory rule. *Blake v. State, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998)*; *Thompson v. State, 691 S.W.2d 627, 631 (Tex. Crim. App. 1984)*; *see Zamora, 411 S.W.3d at 509*. The purpose of the accomplice-witness

instruction is to remind the jury that it cannot use the accomplice's testimony to convict the defendant unless there also exists some non-accomplice testimony tying the defendant to the offense. *Cocke v. State, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006)* (citing *Herron, 86 S.W.3d at 632*). As the Court of Criminal Appeals has explained,

> The instruction does not say that the jury should be skeptical of accomplice witness testimony. Nor does it provide for the jury to give less weight to such testimony than to other evidence. The instruction merely informs the jury that it cannot use the accomplice witness testimony unless there is also some nonaccomplice evidence connecting the defendant to the offense. Once it is determined that such non-accomplice evidence exists, the purpose of the instruction is fulfilled, and the instruction plays no further role in the factfinder's decision-making.

Herron, 86 S.W.3d at 632; *see* *Beeson v. State, 60 Tex. Crim. 39, 130 S.W. 1006, 1008 (Tex. Crim. App. 1910)* ("Is it not rather the intent of the statute that, when other evidence **[*69]** tends to show the crime and defendant's complicity, the disabled or discredited accomplice witness is thereby placed in the same position with other witnesses? It does not say accomplice shall not be believed unless corroborated, but that corroboration is requisite to conviction. Corroboration being furnished, what is to prevent conviction if the jury give credence to her testimony[?]").

While the statute "limits the effect that may be given the testimony of an accomplice, it does not define the terms in which an instruction to the jury shall be framed." *Holladay, 709 S.W.2d at 198*. The Court of Criminal Appeals has noted that, in the past, when provisions of *article 38.14* and its precursors were implicated, "the jury charge was held sufficient if it: (1) defined the term accomplice; (2) gave the statutory inhibition against conviction on uncorroborated accomplice testimony; (3) stated that the corroboration must be as to some material matter tending to connect the accused with the commission of the offense; and (4) applied the law to the facts." *Id.* (citing example of *Standfield v. State, 84 Tex. Crim. 437, 208 S.W. 532, 538 (Tex. Crim. App. 1918)*, which explained what "a charge on accomplice testimony" should do "to be sufficient" and did not include instruction that accomplice-witness testimony must **[*70]** first be believed to be true).

I understand that an accomplice-witness's testimony should be viewed with caution given the individual's possible incentive to lie. *See* *Blake, 971 S.W.2d at 454* (recognizing that accomplice-witness rule "reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person"). However, that may be the reason for the statutory corroboration requirement. *See* *Zamora, 411 S.W.3d at 509* (explaining that accomplice-witness rule expressed in *article 38.14* "has been a part of Texas law since at least 1925, and reflects 'a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution'" (quoting *Blake, 971 S.W.2d at 454*)). The statute does not require an additional instruction as to the truthfulness of the testimony. *See* *id. at 513* (stating that statute's plain meaning "disallows any conviction based upon uncorroborated testimony of an accomplice" and "sets out an 'implicit "If-then" proposition: If the evidence raises an issue of [the witness's status as an accomplice], then the trial court shall instruct the jury [regarding **[*71]** the corroboration requirement]'" (quoting *Oursbourn v. State, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008))* (alterations in original)). Indeed, I have concerns about an instruction that singles out particular witness testimony for a truthfulness determination in such a manner. *See* *Spears v. State, 102 Tex. Crim. 86, 277 S.W. 142, 143 (Tex. Crim. App. 1925)* ("[W]e have fears as to the correctness of the giving of a charge in any case which instructs the jury that if they believe the testimony of any witness is true, they may convict if they believe other specified testimony is present. This smacks tremendously of a charge on the weight of the evidence."). The instruction at issue is simply not necessary—as the statutory corroboration requirement and the criminal burden of proof for conviction fully address the need for belief in the truthfulness of accomplice-witness testimony to sustain a conviction (without drawing attention to one specific type of evidence)—nor, in my view, is it appropriate.

The Criminal Pattern Jury Charges do not include such an instruction in the instruction on accomplice-witness testimony for either an accomplice as a matter of law or for an accomplice as a matter of fact. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Special Instructions, CPJC 3.3, 3.4* **[*72]** (2018). In fact, the committee explicitly recommends *against* including such an instruction because the statute does not require it and, further, it may be an inaccurate statement of the law. *See id.* *3.3*,

3.4 at 62, 75 ("Consequently, an instruction that the jury must first find the accomplice's testimony is true may not be an accurate statement of the law. For these reasons, and because there is nothing in *article 38.14* to support such an instruction, the Committee recommends against it.").

Ultimately, the issue is not whether a jury-charge instruction has been approved, suggested, repeatedly given, or upheld, but whether the instruction is required by law. Because I do not believe the instruction at issue here is required by law, I respectfully disagree with the view expressed in the concurring opinion.

Conclusion

Because I conclude that Ruffins is estopped from complaining about the reasonable-doubt instruction in the application paragraph of the accomplice-witness instruction as to Hogarth and I further conclude that language in the accomplice-witness instruction directing the jury to first find the accomplice-witness testimony to be true is not required by law, I conclude that neither of these **[*73]** alleged jury-charge errors supports reversal of the trial court's judgment of conviction. Accordingly, I respectfully dissent.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Kelly

Filed: August 14, 2020

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Associated Case Party: Anthony Ruffins

Name	BarNumber	Email	TimestampSubmitted	Status
Karen Oprea		karen.oprea@opreaweberlaw.com	10/14/2020 7:21:59 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Emily Johnson-Liu		Emily.Johnson-Liu@SPA.texas.gov	10/14/2020 7:21:59 PM	SENT
Joshua Presley		preslj@co.comal.tx.us	10/14/2020 7:21:59 PM	SENT